CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD, PETITIONER,

vs.

THE STATE OF OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED AUGUST 19, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No.

ASA H. WHITFIELD, PETITIONER,

vs.

THE STATE OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE MUNICIPAL COURT OF CLEVELAND

Affidavit of R. C. Kissack—Filed Oct. 2, 1934

The State of Ohio,
    Cuyahoga County,
        City of Cleveland, ss:

Before me, Paul D. Grandis Deputy Clerk of the Municipal Court of the City of Cleveland, personally came R. C. Kissack who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October A.D. 1934 at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation.

2nd Count

R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A.D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kssack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit: six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at the Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation and further deponent says not, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Ohio.

X (Signed) R. C. Kissack.

Sworn to and subscribed before me, this 2 day of October, A. D. 1934. Paul DeGrandis, Deputy Clerk of the Municipal Court of Cleveland. (Seal.)

(Signed) Ezra J. Shapiro, Prosecuting Attorney, the Municipal Court of Cleveland.

[fol. 3] IN MUNICIPAL COURT OF CLEVELAND

WARRANT OF ARREST

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

To the Bailiff of The Municipal Court of Cleveland, Greeting:

Whereas, Complaint upon oath by R. C. Kissack has this day been filed with me, Peter J. Henry, Clerk of the Municipal Court of the City of Cleveland, that on or about the 2nd day of Oct. A.D. 1934, at said City and County, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit, one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation.

2nd Count

R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A. D., 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack, in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit; six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at the Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation, contrary to the form of Statute in such cases made and provided.

These are therefore, in the name of the State of Ohio, to command you that you take the said Asa H. Whitfield if he be found in your County, or if he shall have fled, that you pursue after the said defendant into any County in the State, and safely keep the said defendant so that you [fol. 4] have — forthwith before our Municipal Court, to answer to said complaint, and be dealt with according to law.

Given under my hand, and the seal of said Court, this 2nd day of Oct. A. D. 1934.

Peter J. Henry, Clerk of the Municipal Court of Cleveland, by (Signed) Paul DeGrandio, Deputy Clerk of the Municipal Court of Cleveland. (Seal.)

[fol. 5] IN THE MUNICIPAL COURT OF CLEVELAND, CRIMINAL BRANCH

No. —

THE STATE OF OHIO, Plaintiff,

vs.

ASA H. WHITFIELD, Defendant

DEMURRER

Comes now the defendant herein and demurs to the warrant issued in the above entitled cause for the reason that same does not charge an offense, all as set forth in the Brief hereto attached.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Notice

Notice is hereby given that the above demurrer will be on for hearing in the Police Court, at the Central Police Station, in Court Room #3 on the 3rd day of October, 1934, at 9:00 o'clock A. M. or as soon thereafter as may be convenient for the Court.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Notice

Notice of the filing of the above demurrer is hereby acknowledged by receipt of copy this 3 day of October, 1934.

(Signed) Michael A. Picciano, Police Prosecutor.

[fol. 6] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

MOTION FOR NEW TRIAL—Filed Oct. 4, 1934

Comes now the defendant in the above entitled cause and moves this Honorable Court that a new trial be granted to the defendant in the above entitled cause for the following reasons; to-wit:

1. That the Court erred in overruling the demurrer filed by the defendant.

2. That the Court erred in overruling defendant's objection to the introduction of any and all evidence.

3. That the Court erred in overruling the defendant's motion for a directed verdict.

4. That the verdict is not sustained by sufficient evidence.

5. That the verdict is contrary to law.

6. That the verdict is contrary to the Constitution of the United States of America.

7. For other errors of law occurring at the trial, as indicated by the record.

(Signed) Malcolm E. Molner, Attorney for Defendant.

[fol. 7] Notice

Notice is hereby given that the above motion will be on for hearing in Court Room #3, Police Court of the City of Cleveland, on the —— day of October, 1934, at —— o'clock or as soon thereafter as may be convenient to the court.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Acknowledgment

A copy of the above motion has been received this 4 day of October, 1934.

(Signed) J. J. P. Corrigan, Police Prosecutor.

Brief

The Court will refer to the Brief of the Defendant heretofore filed and attached to the demurrer which Brief so filed is made a part hereof as though fully rewritten.

(Signed) Malcolm E. Molner, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 8] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

MOTION IN ARREST OF JUDGMENT AND DISCHARGE OF DEFENDANT

Now comes Asa H. Whitfield, the Defendant in the above entitled cause and moves that judgment therein be arrested; that the warrant be dismissed and the Defendant be discharged, for the following reasons, to-wit:

1. The warrant charges no offense.

2. The evidence shows that the offense with which the Defendant is charged is a transaction in Inter-State Commerce and beyond the power of the State of Ohio to regulate or control.

3. The evidence shows that the offense with which the Defendant is charged is having in his possession for sale, merchandise in the original package and is a transaction in Inter-State Commerce and beyond the power of the State of Ohio to regulate or control.

4. The evidence shows that the offense with which the Defendant is charged is offering for sale merchandise in the original package and is a transaction in Inter-State Commerce and beyond the power of the State of Ohio to regulate or control.

5. The activity in which the evidence shows the Defend- [fol. 9] ant is engaged is transaction in Inter-State Commerce, which the United States alone has the power to regulate or control.

6. The Defendant is denied due process of law to which he is entitled under the Fourteenth Amendment to the Constitution of the United States of America.

7. The act of Congress known as the Hawes Cooper Act (Forty-Five Statutes at Large, p. 1084, Ch. 79) under which the State of Ohio claims the power to arrest and prosecute the Defendant on the grounds charged in the warrant, is invalid and unconstitutional and beyond the power of the Congress to enact.

8. That the evidence fails to show that there is anything injurious, harmful or deleterious about the goods sold.

9. That there is nothing injurious, harmful or deleterious about the goods sold.

(Signed) Malcolm C. Mulner, Attorney for the Defendant.

[fol. 10] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

JOURNAL ENTRIES

Oct. 3, 1934—Defendant in Court, affidavit filed, warrant issued and returned, defendant pleads not guilty. Demurrer filed, and same overruled, hearing had, and he is found guilty, and sentenced to pay a fine of twenty-five dollars and the costs. Defendant gives notice of a motion for a new trial, same overruled. Defendant excepts, and gives notice to prosecute error proceedings. Case continued to Oct. 13, 1934.

Oct. 13, 1934—Bill of Exceptions signed, sealed, and allowed.

Oct. 16, 1934—Original papers and Bill of Exceptions sent to the Court of Appeals.

March 1, 1935—On this day a mandate was received from the Court of Appeals, of Ohio, eighth district, affirming the judgment. Case continued to Mar. 8, '35.

March 8, 1935—Defendant in Court, case continued to April 16, and from then to May 16, and June 17, 1935.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 11 & 12] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS

Appearances:

On behalf of the State of Ohio: Michael A. Picciano, Chief Police Prosecutor; J. J. P. Corrigan, Assistant Police Prosecutor.

On behalf of the Defendant: Malcolm E. Molner, Esq.

[fol. 13] [Title omitted]

Be it rememberd, That at the October, A. D. 1934, term of said court, to-wit, on Wednesday, October 3, A. D. 1934, this case came on to be heard, in Court Room 3, (Criminal Branch) before Honorable George S. Tenesy, one of the judges of said court, at which time the following proceedings were had:

Mr. Molner: Your Honor, there was a demurrer filed by the Defendant.

The Court: Yes, overruled.

Mr. Molner: Exception. If your Honor please, at this time, on behalf of the Defendant, we object to the introduction of any evidence on behalf of the State of Ohio for the reason that the warrant, and the information therein, does not charge an offense.

Mr. Corrigan: I would like your Honor to overrule that, [fol. 14] and we will submit, by stipulation, an agreed statement of facts.

The Court: Overruled.

Mr. Molner: The Defendant excepts fo the overruling of that objection. We then have a stipulation of facts that I think ought to be read into the record.

Mr. Corrigan: I will read this stipulation now.

"It is hereby agreed and stipulated by and between counsel for the State of Ohio and counsel for the Defendant, that the facts and the evidence in the above captioned case is as follows: Stipulation as to First Count.

"That on the 2nd day of October, A. D. 1934, the Defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray men's work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio, via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.''

(Now, this is a stipulation as to the second count, your Honor please:)

''That on the 2nd day of October, A. D. 1934, the Defend- [fol. 15] ant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen chambray men's work shirts for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the Defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison, in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package as shipped, by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.''

Which stipulation is hereto attached and made a part of this bill of exceptions, the same as is set forth at length herein.

[fol. 16] Thereupon the State, further to maintain the issues on its behalf to be maintained, called as a witness one R. C. **Kissack**, who, being first duly sworn, testified as follows:

Direct examination of R. C. Kissack.

By Mr. Corrigan:

Q. Now, your name?
A. R. C. Kissack.
Q. Now, Mr. Kissack, have you heard the stipulation read?
A. I have.
Q. Are the facts contained in this stipulation true as you know them?
A. Yes.

Mr. Corrigan: That is all.
Mr. Molner: That is all.
Mr. Corrigan: The State rests with that, your Honor.
Mr. Molner: If your Honor please, at this time, on behalf of the Defendant, we move that the warrant be quashed and the Defendant discharged for the reason that the warrant does not show any offense on which the Defendant can be charged.
The Court: Overruled.
Mr. Molner: Exception.

Thereupon the Defendant, Asa H. Whitfield, to maintain the issues on his behalf to be maintained, offered himself as a witness and, having been first duly sworn, testified as follows:

[fol. 17] Direct examination of Asa H. Whitfield.

By Mr. Molner:

Q. Your name is Asa H. Whitfield?
A. Yes.
Q. You have heard the stipulation, Mr. Whitfield, that has been read?
A. Yes, sir.
Q. Those facts are substantially correct, are they?
A. Yes, sir.
Q. You are the defendant in the case?
A. I am.
Q. And your defense is that the law, as passed, is unconstitutional under the Federal Constitution?
A. Yes.

Q. That it violates the Federal Constitution?
A. Yes.
Q. And you are the agent of the State of Alabama?
A. Yes.

Mr. Molner: That is all.
Mr. Corrigan: No cross-examination.
Mr. Molner: That is all.

Thereupon the State of Ohio rested.
Thereupon the defendant rested.
Testimony closed.

[fol. 18] Mr. Molner: The Defendant renews the motion, your Honor.
The Court: Overruled.
Mr. Molner: Exception.

The above and foregoing, together with the stipulation heretofore read into evidence, and which is attached to and made a part hereof, was all of the evidence offered and received upon the trial of this case in said Municipal Court of Cleveland, in and for Cuyahoga County, Ohio.

Mr. Corrigan: If your Honor please, the minimum penalty for the first offense, or violation of this Section, is $25 and costs. I ask your Honor to assess the fine at this time.

Mr. Molner: We would like your Honor to set an appeal bond. This matter, of course, is going to be appealed, and we will have a bondsman down here in the next 20 minutes.

The Court: The entry will be "Defendant found guilty, $25 and costs; motion for new trial overruled; Defendant excepts, and notice of intention to appeal."

Mr. Molner: I would suggest a hundred dollar bond would be sufficient.

[fol. 19]

Finding of Guilt

Thereupon, after the arguments of counsel, and after due consideration, the Court found the Defendant Asa H. Whitfield guilty of G.C2028-1 as charged in the first and second counts, as appears of record in this case; to which finding and decision of the Court counsel for the Defendant then and there duly excepted.

MOTION FOR NEW TRIAL OVERRULED

And thereafter, at the October, A. D. 1934, term of said court, to-wit, on the 3rd day of October, A. D. 1934, being within three days after the rendition of said verdict, and within the time fixed by law, the Defendant filed his motion for a new trial of this case, which said motion is a part of the record in this case, for the reasons and upon the grounds in said motion stated and set forth.

And thereafter, at the October, A. D. 1934, term of said court, to-wit, on the 3rd day of October, A. D. 1934, said motion for a new trial was overruled by the Court, as appears of record in this cause; to which ruling of the Court counsel for the Defendant then and there duly excepted.

SENTENCE

Thereupon the Court sentenced the Defendant Asa H. Whitfield to pay a fine of $25 and to pay the costs of this case, as appears of record in this case; to which sentence counsel for the Defendant then and there duly excepted.

Thereupon counsel for the Defendant moved the Court for a suspension of the sentence above set forth pending filing of the bill of exceptions; on consideration whereof, the Court granted suspension of said sentence for a period of 10 days from the 3rd day of October, A. D. 1934, and [fol. 20] fixed the bail bond to be given by said Defendant Asa H. Whitfield at the sum of $100.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, being within 10 days after the overruling of said motion for a new trial, and within the time fixed by the Court and allowed by law, the Defendant Asa H. Whitfield filed with the Clerk of this Court this, his bill of exceptions, and prayed that the same might be allowed and signed by the Trial Judge, and filed as, and made a part of, the record in this case; but not spread at large upon the Journal.

Receipt of said bill of exceptions is hereby acknowledged this 10 day of October, A. D. 1934.

(Signed) Peter J. Henry, Clerk, by (Signed) E. J. Patton, Deputy Clerk.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, notice of the filing of this bill of exceptions was duly served upon Michael A. Picciano, Chief Police Prosecutor, and J. J. P. Corrigan, Assistant Police Prosecutor, attorneys for the State of Ohio, the State of Ohio, Plaintiff, being the adverse party herein, by the Clerk of this Court.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, being not less than 10 days after such notice of the filing of said bill of exceptions, and within five days after the expiration of such 10 days, to-wit, —— days after the service of such notice, this bill of exceptions was duly transmitted by the Trial Judge to the Clerk of this Court, [fol. 21] together with all objections and amendments filed thereto.

Receipt of said bill of exceptions and all objections and amendments filed thereto is hereby acknowledged, this 10 day of October, A. D. 1934.

(Signed) Geo. S. Tenesy, Trial Judge.

ORDER ALLOWING BILL OF EXCEPTIONS

And now, upon the 10th day of October, A. D. 1934, being within five days after the receipt of said bill of exceptions and all objections and amendments filed thereto, from said Clerk, and upon due consideration of the same, said bill of exceptions is hereby allowed and signed by the Court, and it is ordered that the same be transmitted to the office of the Clerk of this Court, forthwith, and that the same be filed as, and made a part of, the record in this case, but not spread at large upon the Journal.

(Signed) Geo. S. Tenesy, Trial Judge.

[fol. 22] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

STIPULATION OF FACTS

It is hereby agreed and stipulated by and between counsel for the State of Ohio and counsel for the defendant, that the facts and the evidence in the above captioned case is as follows:

Stipulation as to First Count

That on the 2nd day of October, A.D. 1934, the Defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray Men's Work Shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the [fol. 23] original package, as shipped by interstate commerce into the state of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.

Stipulation as to Second Count

That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, 6 dozen Chambray Men's Work Shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.

(Signed) Michael A. Picciano, Attorney for the State of Ohio. (Signed) Malcolm E. Molner, Attorney for Defendant.

[fol. 24] IN THE COURT OF APPEALS

No. 14526

ASA H. WHITFIELD, Plaintiff-in-error,

vs.

STATE OF OHIO, Defendant-in-error

PETITION IN ERROR—Filed October 16th, 1934

Plaintiff-in-error, Asa H. Whitfield, for his petition-in-error, says that at the September, A. D. 1934, term of the Municipal Court of Cleveland, Criminal Division, in a criminal action therein pending, being cause #38,497 on the docket of said Court, wherein the defendant-in-error, State of Ohio, was plaintiff and the plaintiff-in-error, Asa H. Whitfield, was defendant, by the decision of the Court, said plaintiff-in-error was found guilty of violating Section 2228-1 of the General Code of the State of Ohio, as charged by the defendant-in-error, and was fined Twenty-five Dollars ($25.00) together with the costs of said action; that a transcript of the docket and Journal Entry and the original pleadings and papers, including the Bill of Exceptions, are filed with this petition-in-error.

There is error in the said record and proceedings prejudicial to the rights of this plaintiff-in-error, in this, to-wit:

1. The court erred in overruling the motion for a new trial by the plaintiff-in-error.

2. That the said judgment is contrary to law and against the weight of the evidence.

3. The court erred in overruling the De*umm*er of this [fol. 25] plaintiff-in-error.

4. The court erred in admitting evidence over the objections of the plaintiff-in-error and to which exceptions were duly noted at the time.

5. The court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the plaintiff below.

6. The court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case.

7. The verdict is contrary to the Constitution of the United States of America.

8. The Court erred in overruling the Motion of the Plaintiff-in-error to quash the warrant issued on behalf of the plaintiff below.

9. For other errors on the face of the record prejudicial to the rights of the plaintiff-in-error.

Wherefore, the plaintiff-in-error prays that said judgment may be reversed and that he may be restored to all things lost thereby.

Malcolm E. Molner, Morton M. Stotter, Attys. for Plaintiff-in-error.

The defendant-in-error hereby waives the issuance of summons-in-error on the within petition-in-error and voluntarily enters his appearance herein this 16th day of October, 1934.

J. J. P. Corrigan, Atty. for Defendant-in-error.

[fol. 26] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 27] IN THE COURT OF APPEALS

[Title omitted]

DOCKET ENTRIES

October 16, 1934—Petition in error, waiver of summons in error and entry of appearance of defendant in error filed.

October 20, 1934—Original papers and Bill of Exceptions filed.

December 24, 1934—Brief of plaintiff in error, and two copies filed.

February 11, 1934—Brief of Defendant in error, and two copies filed.

February 11, 1935—Brief of Amici Curiae, and two copies filed.

February 18, 1935—To Court.

JUDGMENT

This cause came on to be heard upon the pleadings, and the transcript of the record in the Municipal

Court of the City of Cleveland, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Municipal Court is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered, that a special mandate be sent to said Municipal Court, to carry this judgment into execution. The Plaintiff in error excepts.

Journal 10, Page 517.

February 25, 1935—Mandate, Original Papers and Bill of Exceptions to Police Court.

[fol. 28] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 29] IN COURT OF APPEALS OF OHIO

[Title omitted]

MANDATE

This Cause came on to be heard upon the pleading, and the transcript of the record in the Municipal Court of the City of Cleveland, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Municipal Court is affirmed there being, however, in the opinion of the Court, reasonable ground for this proceeding in error.

It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein.

Ordered, that a special mandate be sent to said Municipal Court, to carry this judgment into execution. The plaintiff in error excepts. John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness, my hand and the seal of said Court, at Cleveland, this 18th day of Februrary A.D. 1935.

John J. Busher, Clerk. By (Signed) Edward (illegible), Deputy. (Seal.)

[fol. 30] COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY

To the Honorable Municipal Court in and for the City of Cleveland, Ohio, Greeting:

You are hereby commanded, that without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, John J. Busher, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 18th day of February, A.D. 1935.

John J. Busher, Clerk. By (Signed) Edward (illegible), Deputy. (Seal).

[fol. 31] IN THE SUPREME COURT OF OHIO

ASA H. WHITFIELD, Plaintiff-in-error,

vs.

STATE OF OHIO, Defendant-in-error

PETITION-IN-ERROR—Filed March 14, 1934

The above named Plaintiff-in-error, Asa H. Whitfield, complains of the defendant-in-error, the State of Ohio, for that on the 3rd day of October, 1934, the Municipal Court of Cleveland, Ohio, adjudged and imposed sentence against him, in that he be fined $25.00 and that he pay the costs of prosecution against him in a certain criminal action then pending in said court wherein he was defendant and the State of Ohio was plaintiff, and which criminal action was founded on a certain warrant charging him with having sold and offered for sale on the open market in the City of Cleveland, one dozen Chambray Men's Work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners confined at Wetumpka Prison in the State of Alabama; that said prisoners at the [fol. 32] time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio, via United States Parcel Post from Wetumpka Prison in the State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio, and further;

That on the 2nd day of October, A.D. 1934, the Defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen Chambray men's work shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack, but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation, all in violation of Section 2228-1 of the General Code of Ohio.

The plaintiff-in-error instituted proceedings in error in the Court of Appeals of Cuyahoga County for a reversal of the judgment and finding against him, the same being No. 14526 on the docket of said Court, and on hearing of the same said Court of Appeals affirmed the said judgment.

A true, complete and duly certified transcript of the record and proceeding had in said cause together with the original papers is filed herewith and made a part hereof.

[fol. 33] The plaintiff-in-error says that there is prejudicial error against him in said record and proceeding had in said cause in this, to-wit:

1. Said Court of Appeals erred in finding no error and erred in affirming the judgment of said Municipal Court of Cleveland.

2. That the Municipal Court of Cleveland erred in overruling the motion of the plaintiff-in-error to quash the warrant issued by the plaintiff below; that said Municipal Court of Cleveland erred in overruling the motion made by the plaintiff-in-error for a new trial; erred in rendering judgment and imposing sentence against him; erred in overruling the motion for directed verdict in his favor and that he be discharged; error in overruling the demurrer of this plaintiff-in-error; erred in admitting evidence over the objections of the plaintiff-in-error and to which exceptions were duly noted at the time; erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case; for other errors on the

face of the record prejudicial to the rights of the plaintiff-in-error.

3. That the verdict is contrary to the Constitution of the United States of America.

Wherefore Plaintiff-in-error prays this Court that the [fol. 34] judgment of the said Court of Appeals and of the said Municipal Court of Cleveland, Ohio, be reversed, set aside and held for naught; that this Court render the judgment that said Courts ought to have rendered; that plaintiff-in-error be restored to all things he has lost by reason of said erroneous judgments and for all proper relief in the premises.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, attorneys of record for the above named defendant-in-error, hereby acknowledge service of notice of the filing of the above petition-in-error and receipt of copy of said petition-in-error this 12th day of March, 1934.

(Signed) J. J. Corrigan, Central Police Station,
—— ——, Attorneys for Defendant-in-error.

[fol. 35] Acknowledgment of Service, Waiver of Service and Entry of Appearance

We, hereby acknowledge receipt of a copy of the petition-in-error by copy, and do hereby waive the issuance of summons thereon and enter appearance therein, in case #25308 in the Supreme Court of Ohio, same being Asa H. Whitfield, plaintiff-in-error, vs. State of Ohio, defendant-in-error. The issuance of summons in error is hereby expressly waived.

(Signed) Stephen Gobozy, Attorney for the State of
Ohio, Defendant-in-error.

[fol. 36] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO CERTIFY THE RECORD

Now comes Asa H. Whitfield, plaintiff-in-error, herein, and plaintiff-in-error in the Court of Appeals of Cuyahoga County, Ohio, and moves this Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify its record to the Supreme Court of Ohio, in the cause of Asa H. Whitfield, plaintiff-in-error, vs. State of Ohio, defendant-in-error, being cause #14526, on the docket of said Court of Appeals of Cuyahoga County, Ohio, wherein the said Court of Appeals sustained and affirmed the judgment and sentence of the Municipal Court of Cleveland, in that the plaintiff-in-error be fined $25.00 and pay the costs therein for the following reasons, to-wit:

1. That the Court of Appeals erred in finding no error and erred in affirming the judgment of said Municipal Court of Cleveland.

[fol. 37] 2. That the Municipal Court of Cleveland erred in overruling the motion of the plaintiff-in-error to quash the warrant issued by the plaintiff below; that said Municipal Court of Cleveland erred in overruling the motions made by the plaintiff-in-error for a new trial; erred in rendering judgment and imposing sentence against him; erred in overruling the motion for a directed verdict in his favor and that he be discharged; erred in overruling the demurrer of this plaintiff-in-error; erred in admitting evidence over the objections of the plaintiff-in-error, and to which exceptions were duly noted at the time; erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case; for other errors on the face of the record prejudicial to the rights of the plaintiff-in-error.

3. That the verdict is contrary to the Constitution of the United States of America.

4. That the cause is of both public and great general interest.

5. That the cause of the plaintiff-in-error involves a debatable question involving the constitution of the United States of America.

Wherefore Plaintiff-in-error, Asa H. Whitfield, prays this Honorable Court for an order directing the Court [fol. 38] of Appeals of Cuyahoga County, Ohio, to certify its record in cause No. 14526 on the docket of said Court of Appeals to the Supreme Court of Ohio.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Notice

The defendant-in-error will take notice that the plaintiff-in-error, Asa H. Whitfield, intends to file forthwith, in the Supreme Court of Ohio, the foregoing motion and that the same will be for hearing in accordance with the rules of said court on a date to be fixed by the Clerk, notice of which will be given to counsel for defendant-in-error as required by the rules of said court.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, attorneys of record for the above named defendant-in-error hereby acknowledge service of notice of the filing and the time of hearing of the above motion and receipt of a copy of said motion and notice of counsel for plaintiff-in-error in support of said motion this 12 day of March, 1935.

(Signed) J. J. Carrigan, Attorney for Defendant-in-error.

[fol. 39] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR STAY

Now comes the plaintiff-in-error and moves this Honorable Court for an order staying the proceedings herein and the execution of the sentence and judgment against this plaintiff-in-error heretofore rendered in the Municipal Court of Cleveland, Ohio, until such time as this Court hears and determines the motion of the plaintiff-in-error for leave to file his petition-in-error in this Court.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Notice

The Defendant-in-error will take notice that the plaintiff-in-error, Asa H. Whitfield, intends to file forthwith, in the Supreme Court of Ohio, the foregoing motion and that same will be for hearing in accordance with the rules of said Court, notice of which will be given to counsel for [fol. 40] defendant-in-error as required *to* the rules of said court.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, Attorneys of record for the above named defendant-in-error, hereby acknowledge service of notice of the filing and the time of hearing of the above motion and receipt of a copy of said motion and notice of counsel for plaintiff-in-error in support of said motion this 5th day of March, 1934.

(Signed) Stephen Gobozy, Attorney for Defendant-in-error.

[fol. 41] IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER SUSPENDING JUDJMENT—March 14, 1935

This day, this cause came on to be heard upon the application of the Plaintiff-in-error for an order to stay the execution of the final judgment in this proceeding rendered by the Municipal Court of Cleveland, Ohio, until this court hears and determines the motion of the plaintiff-in-error for leave to file his petition-in-error in this court, and the court or a Judge thereof being fully advised sustains said motion.

It is therefore ordered that the sentence and fine heretofore imposed upon the said Asa H. Whitfield, plaintiff-in-error, be suspended until such time as is required for the hearing and decision of the motion of the plaintiff-in-error for leave to file his petition-in-error and the Clerk of this Court is directed to forthwith transmit to the Municipal Court of Cleveland, Ohio, a true copy of this order.

(Signed) Arthur H. Day, Judge.

[fol. 42] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO STRIKE PETITION IN ERROR—Filed April 5, 1935

Now comes the State of Ohio, defendant in error, and respectfully moves this Honorable Court to strike the Petition in Error from the files and dismiss the proceedings in error for the following reasons, to-wit:

1. That there is no reversible error in the record.

2. That substantial justice was had by plaintiff in error.

Wherefore, defendant in error submits that this Motion to Strike should be allowed.

(Signed) Ezra Z. Shapiro, Director of Law; Michael A. Piccano, Assistant Director of Law, in Charge of Criminal Branch; Stephen Gobozy, J. J. P. Corrigan, Assistant Prosecutors, Attorneys for Defendant-in-Error.

[fol. 43] Acknowledgment

Plaintiff in Error acknowledges receipt of the foregoing motion and accompanying brief this 3rd day of April, 1935.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-Error.

[fol. 44] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed May 22, 1935

Application is hereby respectfully made to this Honorable Court for a rehearing in the above entitled cause upon the motion of the plaintiff-in-error to certify the record of the Court of Appeals of Cuyahoga County in this cause; and upon the petition-in-error filed as of right by the plaintiff-in-error herein, and on the motion of the defendant-in-error to strike the petition-in-error.

Both the petition-in-error and the motion of the plaintiff-in-error to certify the record of the Court of Appeals in the above case raise the constitutional questions arising under the Constitution of the United States of America of the right of the Congress of the United States of America to divest itself of the right to regulate the interstate shipment of convict made goods manufactured by convict labor [fol. 45] in the various states of the union. The Petition-in-error and the Motion of the plaintiff-in-error to certify the record also raise the constitutional question arising under the Constitution of the United States of America of the right of the Congress of the United States of America to divest such goods of their interstate character; and of the right of the General Assembly of Ohio to enact section 2228-1, General Code of Ohio, which reads as follows:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined, wholly or in part, in any other state by convicts, or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State."

The Act of Congress in question is the Hawes-Cooper Act, 45 Statutes at Large, 1984. Chapter 79 of the Act is the object contended by plaintiff-in-error, which violates Article I, section I; the "Commerce clause" and the Tenth Amendment to the Constitution of the United States.

It is contended that Congress, by divesting convict made goods of their interstate character has unlawfully delegates its powers to the various state legislatures.

"* * * it may be admitted, that Congress cannot give a right to a state in virtue of its own powers * * *" Gibbons vs. Ogden, 9 Wheat. 1, 2020.

"* * * nor can Congress transfer legislative powers to a state, nor sanction a state law in violation of the constitution; * * *" In re: Rahrer 140 U. S. 545, 560.

The Court of Appeals has upheld the validity of these statutes stating that prison made goods can be sold in the [fol. 46] open market at a price which is below the actual cost or production of manufacturers employing free labor. We fail to agree with the learned Court's reason. That question has been determined by the United States Supreme Court in the case of Hammer vs. Dagnhart, 247 U. S. 251. We quote from the court's opinion:

"The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The Act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless."

And again, the United States Supreme Court in the case of Clark Distilling Company vs. Railway, 242, U. S. 311, held as follows:

"In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the constitution embrace."

The above case referred to the interstate transportation of intoxicating liquors, and because of the exceptional nature of the goods, and because of the strong language which the court employed it must be presumed that the instant case does not fall into that class of exceptions set forth in the above case.

And the Supreme Court of the United States, commenting directly upon the question of economic disadvantages stated in the case of Hammer vs. Dagenhart (supra) as follows:

"There is no power vested in Congress to require the [fol. 47] states to exercise a police power so as to prevent unfair competition. Many causes may co-operate to give one state by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions."

The Ohio Supreme Court in the case of Arnold vs. Yanders, 56 O.S. 417 (a case involving the right of the State of Ohio to regulate the sale of convict made goods) stated:

"The Act in question is not a police regulation, but an attempt to prevent or at least discourage, the importation of convict made goods from other states, and thereby protect our citizens, laborers and markets against such goods." (page 421.)

The Court further held in the same case that—

"The police power is reserved to the states, and they have the right to regulate internal trade, so as to protect the health and public welfare of the people, but this power cannot be so extended as to encroach upon interstate commerce; * * *"

It will be noted from the record that it was stipulated in the lower court upon the trial of the case that the goods in question are not harmful, injurious or deleterious in their nature.

It therefore follows that since there is no exceptional nature about the goods in question so as to require the General Assembly of Ohio to prohibit the sale thereof, and that since Congress cannot properly enact the Hawes-Cooper Act, upon which the Ohio Act rests, there is no constitutional authority properly given to the States, and that authority failing this court is bound to follow its ruling in the case of Arnold vs. Yanders (supra).

We respectfully submit that we have before us the first [fol. 48] step toward the establishment of unconstitutional trade barriers set up by the State of Ohio against other states. Obviously, if these acts are valid, what is to prevent the ban on goods made by Chinese, Negro or any other class of labor? Or what is to prevent the prohibition of non-union made goods. The object of the Acts is plainly seen. It is to free labor organizations and certain manufacturers from the competition of prison made labor infinitesimally slight though it be. To open the door to such legislation is to erect light barriers in favor of any activity, industry or organization which becomes politically strong enough to compel favorable legislation. To day it is prison labor, tomorrow it may be anything else.

It is respectfully submitted that this application for rehearing should be granted.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

[fol. 49] Notice

The defendant in error will take notice that the plaintiff in error, Asa H. Whitfield, intends to file forthwith, in the

Supreme Court of Ohio, the foregoing application for rehearing.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-Error.

Acknowledgment

The undersigned attorneys of record for the above named defendant in error hereby acknowledges service of the filing of the above application for rehearing and receipt of a copy of said application and notice this 20th day of May, 1934.

(Signed) Stephen Gobozy, Attorneys for Defendant in Error.

[fol. 50] IN THE SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

Attorneys: For plaintiff in error, Malcolm E. Molner, Morton M. Stotter, Cleveland;

For defendant in error, Ezra Z. Shapiro, Michael A. Picciano, Stephen Gobozy, J. J. P. Corrigan, Cleveland.

Action: Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record.

Error to the Court of Appeals of Cuyahoga County.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

March 14, 1935—Petition in error as of right and acknowledgment of service filed.

March 14, 1935—Motion for an order to certify record, notice and proof of service filed.

March 14, 1935—Application of plaintiff in error for stay, notice and proof of service filed.

March 14, 1935—Entry staying execution of sentence until final determination of this cause, Arthur H. Day, J., J. 33-651.

March 14, 1935—Plaintiff's brief on motion and proof of service filed.

[fol. 51] March 18, 1935—Waiver of Summons and entry of appearance of Petition in error filed.

March 18, 1935—Transcript of docket and journal entries of Court of Appeals filed.

April 5, 1935—Motion by defendant in error to dismiss petition in error filed as of right, defendants brief on motion and proof of service filed.

May 15, 1935—Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record overruled. Journal 33, page 698.

May 15, 1935—Motion by defendant in error to dismiss petition in error filed as of right sustained. J. 33-698.

May 15, 1935—Dismissed, no debatable constitutional question involved. J. 33-702.

May 22, 1935—Application for rehearing filed and proof of service filed.

May 25, 1935—Original papers and bill of exceptions filed.

May 29, 1935—Rehearing denied. J. 33-720.

June 10, 1935—Docket entries of Municipal Court filed.

June 12, 1935—Court of Appeals Transcript of Docket and journal entries and Petition in error filed in Court of Appeals filed.

Journal Entries.

March 14, 1935—This day this cause came on to be heard upon the application of plaintiff in error for an order to stay the execution of the final judgment in this proceeding rendered by the Municipal Court of Cleveland, Ohio, until this court hears and determines the motion of the plaintiff in error for leave to file his petition in error in this court, and the court or a Judge thereof being fully advised sustains said motion.

[fol. 52] It is therefore ordered, that the sentence and fine heretofore imposed upon the said Asa H. Whitfield, plaintiff in error, be suspended until such time as is required for the hearing and decision of the motion of the plaintiff in error for leave to file his petition in error and the Clerk of this Court is directed to forthwith transmit to the Municipal Court of Cleveland, Ohio, a true copy of this order. Arthur H. Day, Judge. J. 33-651.

May 15, 1935. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record. It is ordered by the Court that this motion be and the same is hereby overruled. Journal 33, page 698.

May 15, 1935. Motion by defendant in error to dismiss petition in error filed as of right. It is ordered by the Court that this motion be and the same is hereby sustained. Journal 33, 698.

ORDER DISMISSING PETITION IN ERROR

May 15, 1935. Error to the Court of Appeals of Cuyahoga County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of defendant in error to dismiss the petition in error, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said petition in error be, and the same is hereby, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $——. Ordered, That a special mandate be sent the Municipal Court of the City of Cleveland, Ohio, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry." Journal 33, page 702.

ORDER DENYING REHEARING

May 29, 1935. Rehearing Docket. It is ordered by the Court that the application for rehearing herein be, and the same hereby is, denied. Journal 33, page 720.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 377

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 19 1935
CHARLES [illegible] CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD,
Petitioner,
v.
THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

WM. LOGAN MARTIN,
Attorney for Petitioner.

THOMAS E. KNIGHT, JR.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD,

Petitioner,

v.

THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner Asa H. Whitfield files this his petition for writ of certiorari and respectfully shows:

A.

Summary Statement of Matter Involved.

Petitioner was arrested in the City of Cleveland, Ohio on October 2, 1934, upon a warrant issued out of the municipal court of Cleveland, charging the petitioner with (a) unlawfully selling on October 2, 1934, in the City of Cleveland, on the open market, one dozen men's work shirts which had been manufactured by prisoners confined in the Wetumpka Prison of the State of Alabama, such prisoners not being on parole or probation at the time of manufacturing such articles; (b) unlawfully selling for shipment to one R. C. Kissack, by railway express from Wetumpka Prison in Alabama to R. C. Kissack in the City of Lakewood, Ohio, six dozen work shirts which had been manufactured by prisoners in the Wetumpka Prison who were not at the time on parole or probation (R. 2-3).

A demurrer to the complaint on the ground that it charged no offence, was overruled (R. 7). The evidence supported the charges. The court found the defendant guilty and imposed a fine of $25.00 and costs (R. 10). The evidence shows also that there was nothing harmful, injurious or deleterious about the goods sold (R. 13).

By appeal the case went to the Court of Appeals for Cuyahoga County, Ohio and the petitioner (appellant) assigned as errors the following among others: That the municipal court erred (a) in overruling plaintiff's demurrer to the warrant (R. 14), and (b) in rendering a verdict contrary to the Constitution of the United States (R. 15). The case was submitted to the Court of Appeals, which on February 18, 1935 affirmed the judgment of the municipal court (R. 15-16), its opinion appearing herein on pages 26-36.

On March 14, 1935 the petitioner filed in the Supreme Court of Ohio a petition in error, assigning among the prejudicial errors against him that the Court of Appeals had erred in affirming the judgment of the municipal court and that the verdict of such municipal court was contrary to the Constitution of the United States (R. 17-19).

On May 15, 1935 the Supreme Court dismissed the petition in error as involving no debatable constitutional question (R. 29)—*Whitfield* v. *Ohio*, 196 N. E. 164. On May 22 the petitioner filed an application for rehearing (R. 23-26), setting out therein that the petition theretofore filed in the Supreme Court on March 14 raised a question arising under the Constitution (a) as to the right of Congress to divest itself of the power to regulate the interstate shipment of prison-made goods and to delegate this power to the States as it had attempted to do under the provisions of the Hawes-Cooper Act of Congress (45 Stat. at L. 1084); and (b) as to the right of the General Assembly of Ohio (2228-1, 2, General Code of Ohio) to forbid after January 19, 1934 the sale on the open market in Ohio of any goods, wares or merchandise manufactured by prisoners not on parole or probation; the petitioner contending that (c) the Act of Congress is beyond the power of Congress to enact and the Act of the General Assembly of Ohio is beyond the power of the General Assembly to enact; both conditions resting on the ground that neither Congress nor the States have the right to bar interstate commerce in goods not exceptional in their nature; the invalidity of the Act of Congress resting on the additional ground that Congress lacks the power to delegate to the States the right to prevent the shipment of prison-made goods into the States and the sale of such goods in the States (R. 23-26). On May 29, 1935 the Supreme Court of Ohio denied without opinion the application for rehearing (R. 28).

B.

Reasons Relied on for the Allowance of the Writ.

The Hawes-Cooper Act of Congress (*infra* p. 9) undertakes to subject prison-made goods (unless made by prisoners on parole or probation) to the operation and effect of the laws of the several States to the same extent as if such goods had been manufactured in such States. Under the assumed authority of this act the General Assembly of Ohio enacted a law (2228-1, 2, General Code of Ohio) which forbade the sale on the open market after January 19, 1934 of goods manufactured by convicts or prisoners not on parole or probation, and fixed the punishment for the violation thereof.

The petitioner contends: (1) that Congress lacks the power to enact the Hawes-Cooper Act for the reason that its power over interstate commerce is confined to regulating the same, and that by this act Congress undertakes to delegate to the States the power to place an embargo on prison-made goods shipped into such States from other States; and (2) that the legislature of Ohio lacks the power to forbid the sale in the State of Ohio of goods made by prisoners in Alabama and shipped to Ohio for sale on the open market; the goods not being exceptional in their nature. Petitioner contends that under our form of government the power of embargo among the States does not exist, whether its exercise be attempted by either the States or Congress, or through the cooperation of both the States and Congress; the goods sought to be placed under embargo not being exceptional in their nature.

As the result of the prosecution under the warrant petitioner was denied due process of law (R. 6).

In support of the foregoing grounds of application for writ of certiorari the petitioner submits the accompanying brief.

Wherefore, petitioner prays that this Court, pursuant to 28 U. S. C. A. § 344, issue a writ of certiorari to review the judgment of the Supreme Court of Ohio dismissing petitioner's petition in error to review the record of the Court of Appeals of Cuyahoga County, wherein the Court of Appeals sustained and affirmed the judgment and sentence of the municipal court of Cleveland, imposing a fine on petitioner for selling in Ohio goods made by prisoners in Alabama who were not on parole or probation.

Respectfully submitted this August 5, 1935.

Asa H. Whitfield,
By Wm. Logan Martin,
Attorney.

Thomas E. Knight, Jr.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD,

Petitioner,

v.

THE STATE OF OHIO.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court of Ohio.

The Supreme Court of Ohio wrote no opinion in the case. The opinion of the Court of Appeals of Cuyahoga County not having been published is contained herein (pp. 26-36).

II.

Jurisdiction.

(a) The statutory provision sustaining the jurisdiction of this Court is contained in 28 U. S. C. A., § 344. There is drawn in question (1) a statute of the State of Ohio (which the court below held valid (which the petitioner contends is in conflict with the Constitution of the United States; and (2) an Act of Congress (which the court below held valid) which the petitioner contends Congress lacks the power to enact. Petitioner seeks the jurisdiction of this Court on the ground that (3) the statute of Ohio is repugnant to the Constitution of the United States, the decision of the court below being in favor of its validity; (4) that Congress is without the power under the Constitution to enact the Act complained of and which the court below held valid; 28 U. S. C. A., § 344 (b) providing that the power of the Supreme Court to review such a judgment of the highest court of a State "may be exercised as well where the Federal claim is sustained as where it is denied."

(b) The Supreme Court of Ohio dismissed on May 15, 1935, the petition in error filed by the petitioner [(R. 29) *Whitfield* v. *Ohio,* 196 N. E. 164.] An application for rehearing was filed on May 22, 1935 (R. 28) and was denied on May 29, 1935 (R. 28).

(c) The nature of the case and the rulings of the court below bring the case within the jurisdictional provisions of 28 U. S. C. A., § 344, as appears from the following:

1. Petitioner claims the right to sell within the State of Ohio goods made in a prison in Alabama, which are not harmful, injurious or deleterious in their nature and raised this question upon his trial in the municipal court (R. 3, 4, 5, 6, 9-10), in the Court of Appeals (R. 14-15) and in the Supreme Court (R. 18-19, 23-26). The municipal court expressly ruled on a demurrer to the warrant, to which the petitioner excepted (R. 7), and on the motion of the petitioner to quash the warrant, to which the petitioner excepted (R. 9, 10). In order to reach a judgment in the matter, the municipal court was obliged to rule on the statute of Ohio (2228-1, 2, General Code) and on the Hawes-Cooper

Act of Congress (45 Stat. at L. 1084), both of which that court held valid.

2. The conviction of defendant under the statute of Ohio and the Act of Congress referred to, neither of which is constitutional, deprived the petitioner of due process of law (R. 6).

III.

Statement of the Case.

Petitioner adopts as a statement of facts the Summary Statement of Matter Involved as set out in the petition for the writ (pp. 1-3) and adds thereto the following:

It was shown by stipulation that on October 2, 1934, the petitioner, as agent for the State of Alabama, sold to R. C. Kissack in Cleveland on the open market one dozen work shirts for $5.25; that such shirts had been manufactured by prisoners confined in Wetumpka Prison in the State of Alabama, and that at the time of such manufacture such prisoners were not on parole or probation; that the shirts had been shipped to the City of Cleveland by parcel post from Wetumpka Prison to be sold on the open market in the City of Cleveland, and that the shirts were sold in the original package as shipped by interstate commerce and that there was nothing harmful, injurious or deleterious about the goods sold (R. 7-8).

It was further shown by stipulation that on October 2, 1934, the petitioner, as agent for the State of Alabama, sold to R. C. Kissack in Cleveland on the open market six dozen work shirts for a consideration of $31.50; that the shirts were not then delivered to Kissack but petitioner agreed to ship the same to Kissack at Lakewood, Ohio, by railway express from Wetumpka Prison in the State of Alabama; that such shirts had been manufactured by prisoners confined in Wetumpka Prison in the State of Alabama, that at the time of such manufacture such prisoners were not on parole or probation; that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio and that there was nothing harmful, injurious or deleterious about the goods sold (R. 8).

Upon the evidence submitted the court found the petitioner guilty and fined him $25.00 and costs (R. 10).

IV.

Errors of the Court Below Which Are Relied on in This Petition.

The petitioner relies upon the following points:

1. The Hawes-Cooper Act of Congress, undertaking to extend to states the right to bar the sale on the open market of prison-made goods not exceptional in their nature is authorized by neither the interstate commerce clause nor by any other provision of the Constitution.

2. Sections 2228-1, 2 of the General Code of Ohio, under which the fine was imposed on petitioner for the sale of prison-made goods on the open market in Ohio is in conflict with the interstate commerce clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

3. The trial and conviction of the petitioner for the sale of prison-made goods in Ohio which were not exceptional in their nature, denied petitioner due process of law and equal protection of the laws.

V.

ARGUMENT.

1. (*a*) *Congress Lacks the Power to Enact the Hawes-Cooper Act.*

The Hawes-Cooper Act is as follows:

Chap. 79.—An Act to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or territory be subject to the operation and effect of the laws of such State or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This Act shall take effect five years after the date of its approval.

Approved, January 19, 1929.

(45 Stat. at L. 1084, 48 U. S. C. A., § 65.)

Section 2228-1, General Code of Ohio, provides that:

> After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State.

Section 2228-2 provides that:

> Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense. (Effective January 19th, 1934.)

This Court has heretofore declared that Congress lacks the power to bar from interstate commerce goods which are not harmful in their nature. *Child Labor Case* (*Hammer* v. *Dagenhart*), 247 U. S. 251 (62 L. Ed. 1101). In this case the Court in its opinion referred to the *Lottery Case,* 188 U. S. 321 (47 L. Ed. 492), the cases of *Hipolite Egg Company* v. *United States,* 220 U. S. 45 (55 L. Ed. 364), *Hoke* v. *United States,* 227 U. S. 308 (57 L. Ed. 523), *Caminetti* v. *United States,* 242 U. S. 470 (61 L. Ed. 442), and *Clark Distilling Company* v. *Western Maryland Railway Company,* 242 U. S. 311 (61 L. Ed. 326), saying that in each of these instances

> "the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended." 271 (1105).

Referring to the opinion in the case of *In re Rahrer,* 140 U. S. 545 (35 L. Ed. 572), it will be seen that the Court sustained the Wilson Act (after which the Hawes-

Cooper Act is patterned) 26 Stat. at L. 313, on the ground that the power delegated to Congress to regulate commerce was subject to the reserved police powers of the States and that in the exercise of such police powers the State had the right to prohibit commerce in the State in any commodity which endangered the lives, the health, the safety, the welfare or the morals of its people; that as to such commodities the Court held that they could be released by Congress from the protection of interstate commerce upon arrival in that State, so that they might immediately become subject to the local laws of the State enacted for the protection of its citizens from the harm incident to such commerce. The Court held that intoxicating liquor was a thing harmful in its nature, and, hence, where a State prohibited its manufacture or sale within its borders, Congress could properly divest interstate shipments of that article of their interstate character upon arrival in that State, so that such shipments might at once become subject to the police regulations of such State and so that the laws enacted in the exercise of its police powers for the protection of the health, safety and welfare of its citizens, could be enforced upon such shipments from the instant of their arrival and delivery in the State.

The Hawes-Cooper Act proposes to change the basis on which the Wilson Act was declared valid. It is not the character of the goods which are outlawed, but the character of the labor employed in producing the goods. There is nothing harmful in a piece of furniture, a work shirt, an automobile license plate or a package or binder twine merely because it was manufactured wholly or in part by prison labor. Nor do wheat, corn and potatoes produced by prison labor, or coal partly mined by it, differ from those produced or mined by free labor. There is, therefore, no justification in barring them from sale on the ground that the public health, safety or morals are to be protected.

Prison-made goods upon arrival and delivery in the state of destination are not made subject to laws enacted merely in the exercise of the state's police powers, but they are made subject to any class of laws which the state may enact. Their treatment does not enable the state to protect the public health, safety and welfare through its police powers, but to protect from competition those who may be engaged in the manufacture or sale of goods of like kind.

The power to regulate is to "prescribe the rule by which commerce is to be governed". *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1, 196 (6 L. Ed. 23, 70).

The power to regulate navigation is "the power to prescribe rules in conformity with which navigation must be carried on". *Cooley* v. *Board of Wardens,* 53 U. S. (12 How.) 299, 316 (13 L. Ed. 996, 1003).

From the beginning the states were zealous to protect their complete rights over all commerce crossing their borders. Under the Articles of Confederation (Art. IV), goods in interstate commerce were subject to the same duties, impositions and restrictions as goods manufactured in the state of destination. If the laws of the state of destination prohibited the manufacture or sale in that state of certain goods, then no such goods imported from another state could be sold in the first state because the imported goods were subject to the state laws upon their arrival and delivery in the second state. Under the Hawes-Cooper Act Congress attempts, by divesting interstate shipments of prison-made goods of their interstate character upon their arrival and delivery in the state of destination, to make them immediately subject to state laws as fully as if manufactured in that state just as was the case of interstate shipments under the Confederation.

It was this difficulty arising out of interstate commerce that led to the Annapolis Convention of 1786, which in turn resulted in the Convention of 1787.

(b) *Congress Cannot Delegate Its Powers.*

An attempt by Congress to divest itself of any powers is as contrary to the Constitution as is the usurpation by Congress of a power not granted under the Constitution. By attempting to delegate power to the states to share in the regulation of interstate commerce in prison-made goods, by passing an act which attempts to divest a shipment of such goods of its interstate character at an earlier time than interstate shipments of other goods become divested of their interstate character, Congress attempts partially to divest itself of its exclusive power to regulate interstate commerce. By such action each state would secure earlier control of prison-made goods as a result of their being released from the protection afforded interstate shipments and thus such goods would become subject to State laws upon their arrival and ~~delivery~~ in the state of destination. Congress accepts the shipment as a part of interstate commerce and exercises its exclusive power to regulate the shipment during a part of its journey, and then attempts to delegate to the state the power to regulate during the remainder of the journey by abandoning control of the shipment while in transit—that is, before sale. This cannot be done. The interstate jurisdiction attached to the shipment must continue throughout.

It is assumed by its advocates that under the Hawes-Cooper Act states can prohibit the sale of prison-made goods within their borders, and Ohio has enacted such a law (*supra*, p. 10) prohibiting the sale of prison-made goods within its borders. This is an attempted delegation by Congress to the States. Congress has no authority to delegate any power to any state and no state has the authority to exercise such power over interstate commerce, even if Congress attempts to delegate it. Such an Act is unconstitutional both as an attempted delegation which Congress of itself undertakes to return to the States and as an attempted exercise by the states of a power prohibited to them.

No one has before ventured the assertion that the framers of the Constitution intended to authorize Congress, in the exercise of a limited and exclusive power merely to regulate commerce, to withdraw from interstate shipment the protection of its interstate character whenever Congress pleased, and to make that shipment subject to local state laws, control and inhibitions, which might prohibit such commerce and which had been found to be so destructive thereof. Under the plan of the framers the states impliedly agreed not to exercise their power to prohibit such commerce, and they certainly never granted Congress the right to prohibit it. The purpose was to free it from restraint, to promote, foster and encourage it.

The legislative power to regulate commerce can be exercised only by Congress. It cannot delegate to the various states power to legislate on interstate commerce. It cannot do by indirection what it cannot do directly. It cannot by indirection confer on any state power to legislate on interstate commerce by arbitrarily declaring as to certain shipments which have come within the protection of interstate commerce, that they are divested of their interstate character at a certain time, and thereby empower the states to enact legislation controlling them; while holding that other goods retain this character for a longer period. Congress cannot delegate power to a state to control a part of interstate commerce, and retain control of the rest. It cannot authorize state control of some form of that commerce for a part of the time and yet exercise exclusive control over the balance for all the time. It cannot surrender control to the States of prison-made shirts moving in interstate commerce any earlier than it surrenders to their control shipments of steel and iron. Congress has no power, at its whim, to withdraw from an interstate shipment the protection of its interstate character, when that character has once attached and been recognized by Congress; and thereby subject that shipment, while still moving in the recognized channels of interstate commerce, to the regulations or prohibitions of any state.

> "* * * it may be admitted, that Congress cannot give a right to a state, in virtue of its own powers. * * *." *Gibbons* v. *Ogden,* 9 Wheat. 1, 202 (6 L. Ed. 23, 71).
>
> "* * * Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power (citing cases)." *In re Rahrer, supra,* 560 (576).
>
> "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. * * * Ib. 555 (574)
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> * * * * * * *
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> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. * * * Ib. 560 (576)
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> * * * * * * *

As Congress cannot delegate any of its powers to regulate interstate commerce, it cannot delegate any power to prohibit such commerce.

In *South Carolina* v. *United States,* 199 U. S. 437 (50 L. Ed. 261), we find the following rule repeated:

> "To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants." 450 (265)

The Court quoted from *McCulloch* v. *Md.,* 4 Wheat. 316, 431 (4 L. Ed. 579, 607), as follows:

> "* * * Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.' * * *" 455-6 (267)

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The Court said further:

> "* * * The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. * * *" 456 (268)

(2, 3) *The law of Ohio forbidding the sale of prison-made goods shipped in interstate commerce into the state, is in conflict with the interstate commerce clause, and the trial* *and conviction of the petitioner for the sale of such goods denied him due process and equal protection of the laws.*

The reverse of the question of the power of Congress to enact such laws as were considered by this Court in the *Child Labor Case, supra,* and the *Child Labor Tax Case,* 259 U. S. 20 (66 L. ed. 817), has been presented in the case of State laws which have been held to interfere with interstate commerce and which undertook to reach such a shipment and to interpose state regulation before the interstate journey was completed. This Court has not failed to strike down such laws. The question now arises: If a State cannot of its own power surround an interstate shipment with restrictions after it comes within the borders of the State and before the package is broken, can Congress by a mere enactment vest the State government with the power heretofore denied it?

Could Congress have permitted Maryland to impose a tax of $50 upon all importers of foreign goods [*Brown* v. *Maryland,* 25 U. S. (12 Wheat.) 419 (6 L. Ed. 678]?

Could Congress have vested Tennessee with the power to impose a tax on a drummer not having a regular licensed house of business in the taxing district [*Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (30 L. Ed. 694)]?

A sale is as much a part of the interstate commerce journey as is crossing the State border into the State of destination. This was decided early in the history of this country and the opinion written by Marshall who had sat as a member of the convention in Virginia which ratified the Constitution (Elliot's Debates, Vol. 3, 35). Thirty-six years thereafter in *Brown* v. *Maryland, supra,* he said that there was no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country [439 (685)]; that the act denied to the importer the right of using the privilege which he had purchased from the United States, until he should have purchased it from the state [443 (687)].

> "The oppressed and degraded state of commerce, previous to the adoption of the constitution can scarcely be forgotten. * * * It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress. * * * 445-6 (688).

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> "* * * To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * 447 (688).

The Court inquired if this law were held valid,

> "what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another, for commercial purposes. * * * 449 (689).
>
> "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." 449 (689).

In *Robbins* v. *Shelby County Taxing District, supra,* the Court said:

> "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. * * * 493 (696).

* * * * * * *

> "In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. 494 (696).

* * * * * * *

> "* * * Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them. 496-7 (697).

* * * * * * *

> "* * * And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes which led to it." 498 (698).

From the *State Freight Tax,* 82 U. S. (15 Wall.) 232 (21 L. Ed. 146), we take the following:

> "* * * Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. * * *" 275 (161).

In *Ward v. Maryland,* 79 U. S. (12 Wall.) 418 (20 L. Ed. 449), involving an act imposing a $300 license tax on non-residents selling by sample, the Court said:

> "Evidence to show that the framers of the Constitution intended to remove those great evils in the government [inequality of burden and want of uniformity in commercial regulations[1]] is found in every one of the sections of the Constitution already referred to, [interstate commerce, equality of privileges and immunities among citizens, duties on imports and exports, and tonnage clauses[1]] and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another." 431 (453).

United States v. *E. C. Knight Company,* 156 U. S. 1 (39 L. Ed. 325) arose out of an attempted enforcement of the anti-trust act of Congress. The American Sugar Refining Company undertook to acquire four companies doing business in Pennsylvania and which controlled thirty-three per cent. of the sugar business of the country; thus giving the American Company control of ninety-eight per cent. of all the sugar in the country.

> "* * * Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot interfere with the enforcement of such rules. * * * Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be

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[1] Matter in brackets supplied.

> carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. * * *" 32-3 (336).

The Court declared that under the facts the anti-trust act did not apply. It said:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality." 13 (329).

Discussing the contention that the first Employers' Liability Act (34 Stat. at L. 232) was constitutional although it embraced subjects not within the power of Congress to regulate commerce:

> "because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress, * * *"

the Court said:

> "* * * To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state

concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. * * *" *The Employers' Liability Cases,* 207 U. S. 463, 502 (52 L. Ed. 297, 311).

In *Mobile* v. *Kimball,* 102 U. S. 691 (26 L. Ed. 238), the Court said that the subjects upon which Congress could act under its power to regulate interstate commerce were of infinite variety.

> "* * * Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. * * *" 697 (239).

Without the power of Congress there would be

> "no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation." 697 (239).

In *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois,* 118 U. S. 557 (30 L. Ed. 244), the state legislature undertook to regulate freight rates irrespective of whether the freight was an interstate shipment. The Court said:

> "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the

> country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. * * *" 572-3 (249).

Those who advocate the validity of the Hawes-Cooper Act will doubtless not deny that the states lack the power to prohibit the sale within their borders of any article of an unexceptional nature moving therein; for the attempted exercise of any such power on the part of a state would be in conflict with the fundamental institutions of the government of this country. In the case of prison-made goods, likewise unexceptional in their nature, this conflict is suspended by these advocates and states are allowed to prohibit the sale within their borders of such goods shipped from another State. We had thought that this change could be brought about only by an amendment to the Constitution; but now it appears that only a short cut by way of a congressional enactment is necessary to move from invalidity to validity.

Conclusion.

The purpose of the Hawes-Cooper Act is plainly seen. It is to free labor organizations and certain manufacturers from the competition of prison labor. To open the door to such legislation on the part of Congress is to erect like barriers in favor of any activity, industry or organization which becomes politically strong enough to compel favorable legislation. It would vest Congress with the power to say, according to its whim or fancy, what articles should move and what should not move among the states. It would place in the hands of a majority in Congress the power to select any state, either on account of its location, industries, or for any other reason political or otherwise, and pass laws confining the products of such state within its own borders. We had thought that an embargo could be lifted by Congress against only foreign products. But now a power is claimed which if permitted to be exercised would result in erecting barriers around unfavored states. The conflicting and irritating practice of the states before the Constitution was adopted would be increased a thousand fold through the exercise by Congress of this newly-found power over the vast commerce of this country.

Today it is prison labor which its opponents after beating at the door of Congress for fifty years have succeeded in outlawing. Tomorrow it may be non-union labor.

It is therefore respectfully submitted that this case is one in which in a final judgment in the highest court of the State of Ohio there is drawn in question the validity of a statute of the State of Ohio on the ground of its being repugnant to the Constitution of the United States and the decision of the highest court of Ohio is in favor of its validity. Nor is the decision of the state court in accord with the decision of this Court rendered in other cases and specially in the *Child Labor Case* and the *Child Labor Tax Case, supra.*

There was also drawn in question the validity of an Act of Congress which petitioner alleges to be in conflict with the Constitution of the United States and this challenge was not sustained by the Supreme Court of Ohio.

Respectfully submitted,

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Thomas E. Knight, Jr.,
Of Counsel.

Opinion of the Court of Appeals of Cuyahoga County, State of Ohio, Eighth District.

No. 14526.

ASA H. WHITFIELD,
Plaintiff-in-Error.
vs.
THE STATE OF OHIO,
Defendant-in-Error.

February 18, 1935.

Error to the Municipal Court of Cleveland.

LEVINE, J.:

Plaintiff-in-error, who was defendant in the trial court, was convicted upon an affidavit which charges that he unlawfully sold convict made goods, in violation of Section 2228-1 General Code of Ohio. Error proceedings were instituted in this court seeking the reversal of said conviction. The charge was incorporated in an affidavit in the following form:

> "Before me, Paul DeGrandis, Deputy Clerk of the Municipal Court of the City of Cleveland, personally came R. C. Kissack who being duly sworn according to law, deposeth and saith that on or about the 2nd day of October, A. D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in

whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation."

Second Count.

"R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A. D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kissack, via Railway Express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit: Six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation and further deponent says not, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Ohio."

A demurrer was filed on the ground that the law on which said affidavit is based is unconstitutional. The demurrer was overruled by the trial court.

Section 2228-1 General Code provides that:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

Section 2228-2 General Code provides that:

"Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense (Effective January 19th, 1934)."

An agreed Statement of Facts was submitted to the trial Judge, which reads as follows:

> "That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack in the City of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray men's work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped in to the City of Cleveland, via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

It is further stipulated:

> "That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen Chambray men's work shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via railway express, from Wetumpka Prison, in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package as shipped, by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

Plaintiff-in-error relies mainly upon the contention that the judgment rendered by the trial court is contrary to the Constitution of the United States, and that Section 2228-1 General Code is likewise contrary to the Constitution of the United States, in that it violates Article XIV, Section 1, of the Amendments to the Constitution, and also Article 1, Section 8, Clause 3 of the Constitution.

Article XIV, Section 1, of the Amendments to the Federal Constitution reads, in part, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Article 1, Section 8, Clause 3, denominated "Interstate Commerce Clause," reads as follows:

> "The Congress shall have power * * * (3) To regulate Commerce with Foreign Nations and among the several States and with the Indian Tribes."

It is urged that Section 2228-1 when it provides "that goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners shall be excluded from the open market in the State of Ohio," abridges the privileges and immunities of citizens of the United States, in that it deprives a citizen of the United States, who has merchandise made by convicts of another State, from competing with convict-made goods in the State of Ohio.

It is further urged that the Interstate Commerce clause of the Federal Constitution vests sole authority to regulate commerce among the several States in the Congress of the United States; that the State of Ohio, by virtue of said Section 2228-1, attempts to regulate interstate commerce between itself and other States of the Union.

It has been held in *Brown* v. *Maryland,* 12 Wheaton, 419, that "The State cannot divide an Interstate Journey into segments."

It is insisted that the power to regulate interstate commerce granted by the Constitution to Congress is exclusive in its character, so as to preclude the States from exercising such right or power. It is likewise insisted that Congress has the power not only to authorize the importation between the States, but that it also has the power to authorize importers to sell, and that the State of Ohio therefore has no power to impose a law which in any way hinders or prohibits the free flow of commerce among the States.

Since Congress has the right to authorize the importation between the States, it also has the power to authorize the importers to sell. The State of Ohio, therefore, it is contended, has no power to impose a law which in any way prohibits the free flow of commerce between the States.

In its final analysis, the question presented to us may be summarized as follows: Granting that it is within the exclusive power of Congress to authorize the importation of goods and merchandise of other States into the State of Ohio, to what extent, if any, is the State of Ohio possessed of power to regulate the sale of goods that have been so imported from another State?

Section 2228-1 General Code was enacted in accordance with the spirit of Article II, Section 41 of the Constitution of the State of Ohio, and reads as follows:

> **"Abolishing prison contract labor. Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions**

> and reformatories in the State; and no person in any such penal institutions or reformatories while under sentence thereto shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the produce or profit of his work, shall be sold, farmed out, controlled or given away; and the goods made by persons under sentence to any penal institutions or reformatories without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the State or any political subdivision thereof or to any public institution owned and managed or controlled by the State or any political subdivision thereof, *shall not be sold* within this State unless the same are conspicuously marked 'prison made'. Nothing herein contained shall be construed to prevent the passage of laws providing their labor may be disposed of to the State or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the State or any political subdivision thereof. (Adopted September 13th, 1918.) And see Section 14170 General Code."

The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff-in-error to the effect that Section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other States from competing with convict-made goods in the State of Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions.

As we interpret the laws of Ohio, there can be no sale in the open market of goods made by convicts in the State of Ohio; and that the use of such manufactured convict-made goods in Ohio is limited so as to preclude their sale in the open market. There is, therefore, no discrimination against citizens of other States when they are prohibited from selling convict-made goods manufactured in another State in the open market in the State of Ohio.

We are cited to the case of *Arnold* v. *Yanders,* 56 O. S., page 417, in which the court held that the Act of May 19th, 1894, 91 O. L. 546, entitled: "An act to Regulate the sale of convict-made goods, wares and merchandise, manufactured by convicts in other States," is in conflict with section eight of article one of the constitution of the United States and is therefore void. In the opinion the court said:

> "It is not competent for a State legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the State by unfriendly legislation. Whatever Congress, either by silence or by statute, recognizes as an article of traffic and commerce, must be so received and treated by the several States."
>
> "There is no act of Congress declaring that convict-made goods are not fit for traffic and commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one State to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the State where offered for sale is unconstitutional."

The basis of the decision it will be seen is that Congress has not at all times excluded convict-made goods as articles of traffic and commerce. On page 431 of the opinion in *Arnold* v. *Yanders, supra,* the court said:

> "The mere silence of Congress is not sufficient to authorize a State legislature to legislate upon a subject vested by the Constitution in Congress, but such silence is to be regarded as evincing the intention of

Congress that the powers shall remain where the Constitution has placed them.

> "To give a State legislature power to legislate in such cases, required an act of Congress to that effect. (*Leisy* v. *Hardin,* 135 U. S. 100; *Welton* v. *Missouri,* 91 U. S. 275.)"

The basis of the decision of the Supreme Court of Ohio in *Arnold* v. *Yanders, supra,* no longer exists.

The Act of Congress, approved January 19th, 1929, and effective January 19th, 1934, known as the Hawes-Cooper Act, 45 Stat. 1084; 49 U. S. C. A., Section 65, supplied authority which empowered the State of Ohio to act. The Hawes-Cooper Act is entitled: "An act to divest goods, wares and merchandise, manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases."

> "That all goods, wares and merchandise, manufactured, produced or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, except commodities manufactured in Federal, penal or correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such State or territory be subject to the same extent and in the same manner as though such goods, wares and merchandise, had been manufactured, produced, or mined in such State or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

The effect of the Hawes-Cooper Act is to place convict-made goods manufactured in another State in the same category as convict-made goods manufactured in the State of Ohio, and subject to the authority and control of the State of Ohio.

We conclude:

First: That Congress, to the exclusion of the States, is vested with power to regulate interstate commerce; and that until Congress exercised its authority and enacted regulation on the subject, such commerce was free and unrestricted. It is just as well settled that Congress may carry its regulation of interstate commerce to the point of prohibition of the interstate transportation of such articles as may spread evil or harm to the people of States other than the State of origin.

Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 211, 61 L. Ed. 326;
Brooks v. *United States,* 267 U. S. 432, 69 L. Ed. 699;
Bennett v. *United States,* 194 Fed. 630;
West Virginia v. *Adams Express Co.,* 219 Fed. 794, 12 C. J. 60.

Second: Congress may, in the exercise of its power to regulate interstate commerce, place an article under the jurisdiction of the police power of the State upon its arrival in such State.

Leisy v. *Hardin,* 135 U. S. 100.

In *Bowman* v. *Railway Company,* 125 U. S. 495, 31 L. Ed. 700, the Court held:

> "The transportation of commodities between the States shall be free except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress."

Third: Since the Hawes-Cooper Act expressly makes convict-made goods in other States transported to another State subject to the jurisdiction and regulation of the State to which they were transported, the State of Ohio, under its police power may pass laws for the promotion of the general welfare and prosperity of its citizens. The police power of the State is the inherent power to enact laws necessary to protect the order, safety, health, morals and general welfare of the people of the State.

Fourth: The State of Ohio may, by legislation, determine the public policy of the State and declare that the sale of prison-made goods in the open market will result in the destruction of the general welfare, prosperity and safety of the citizens of the State.

> "There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based." *Bailey* v. *Alabama,* 219 U. S. 219, 55 L. Ed. 191.

It is a matter of common knowledge that industries employing free labor required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, can not compete successfully in the open market with prison-made goods and maintain the standard of wages which enables free labor to earn a decent living, or enable such industries to meet wage standards which have been established under national and State legislation. That prison-made goods can be sold in the open market at a price which is below the actual cost of production of manufacturers employing free labor, is patent.

Fifth: Under the terms of the Hawes-Cooper Act, the products of prisoners of other States are, upon their arrival and delivery in Ohio, placed upon the same footing as prison-made goods "produced in such State" and the legislature may provide that they shall not be sold in the open market in Ohio.

Sixth: In *Arnold* v. *Yanders,* 56 O. S., page 422, the court declared void the act of the Ohio Legislature, which sought to regulate the sale of goods produced by prisoners in other States. The sole basis of the decision was that whatever Congress, either by silence or by statute, recognized as articles of traffic and commerce, must be so received and treated by the several States, and that since there is no act of Congress declaring that convict-made goods are not fit for traffic and commerce, it therefore follows that such goods are the subject of commerce, and when transported from one State to another for sale or exchange become articles of interstate commerce, and are entitled to be protected as such; and any discrimination against such goods in the State where offered for sale is unconstitutional. The necessary permission of Congress which was then lacking is now supplied by the Hawes-Cooper Act, and the legislature therefore may constitutionally in conformity with long standing public policy, take such steps as may be necessary to prevent the products of prisoners from other States from entering the open market of Ohio and wield their evil influence.

In view of the above considerations, the judgment of the Municipal Court is affirmed.

Lieghly, P. J., and Terrell, J., concur in judgment.

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Supreme Court of the United States

October Term 1935

No. 377

Asa H. Whitfield, petitioner,
v.
The State of Ohio.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM 1935

No. 377

ASA H. WHITFIELD, PETITIONER,

v.

THE STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals of Cuyahoga County, for the eighth district of the State of Ohio, is reported in 49 Ohio App. 530 (197 N. E. 605). The Supreme Court of Ohio dismissed without opinion the petition in error and denied a re-hearing. (R. 29) The order of the Supreme Court of Ohio is found in 129 Ohio St. 543 (196 N. E. 164).

Jurisdiction

The Supreme Court of Ohio dismissed on May 15, 1935, the petition in error filed by the petitioner (R.

29). An application for rehearing was filed on May 22 (R. 28) and was denied on May 29, 1935 (R. 28).

The petition for writ of certiorari was filed August 19 and was granted October 14, 1935 (R. 29). The statutory provision sustaining the jurisdiction of this court is contained in 28 USCA § 344.

Questions Presented

(a) Whether sections 2228-1 and 2228-2 of the General Code of Ohio, forbidding the sale on the open market in Ohio of prison-made goods, and imposing penalties for the violation thereof, are in conflict with Article 1, Sec. 8, Cl. 3 of, and with the Tenth and Fourteenth Amendments to, the Constitution of the United States and,

(b) Whether the Hawes-Cooper Act of Congress (45 Stat. at L. 1084, 49 USCA § 65), undertaking to withdraw from prison-made goods their interstate character upon their arrival and delivery in the several states, is authorized by Art. 1, Sec. 8, Cl. 3, or by any other provision of the Constitution.

Statutes Involved

The statutes involved are Sections 2228-1 and 2228-2 of the General Code of Ohio and the Hawes-Cooper Act of Congress. These are as follows:

> 2228-1. After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by con-

victs or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market **in this State.**

2228-2. Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense. (Effective January 19th, 1934.)

The Hawes-Cooper Act:

Chap. 79.—An Act to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or territory be subject to the operation and effect of the laws of such State or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This Act shall take effect five years after the date of its approval.

Approved, January 19, 1929.

STATEMENT

On October 2, 1934, a warrant was issued out of the municipal court of Cleveland (R. 2, 3) under which the petitioner, Whitfield, was arrested and charged with unlawfully selling on the open market to one Kissack one dozen chambray men's work shirts, which had been manufactured in whole or in part by convicts or prisoners in Wetumpka Prison in the State of Alabama, who were not at the time of manufacturing the same on parole or probation. A second count charged the petititioner with unlawfully selling for shipment via railway express from Wetumpka prison in Alabama to Kissack in Lakewood, Ohio, six dozen chambray work shirts which had been manufactured in whole or in part by convicts or prisoners in Wetumpka Prison in Alabama, who were not at the time of manufacturing the same on parole or probation (R. 2).

The petitioner was tried under the warrant and found guilty on October 3 under both counts (R. 10).

The facts as stipulated (R. 7, 8) were as follows: The petitioner, as agent for the State of Alabama, had on October 2 sold to one Kissack in Cleveland, on the open market, one dozen chambray men's work shirts for a consideration of $5.25, such shirts having been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama. The prisoners at the time of manufacturing such shirts were not on parole or probation. The shirts were shipped into the City of Cleveland via United States parcel post from Wetumpka Prison in Alabama, to be sold on the open market in Cleveland. The shirts were sold in the original package, as shipped by interstate commerce into Ohio. There was nothing harmful, injurious or deleterious about the goods sold.

The stipulation as to the second count differed from the stipulation as to the first count only in that Whitfield sold to Kissack on the open market in Cleveland, six dozen chambray shirts for $31.50, but that the shirts were not then delivered to Kissack, but Whitfield agreed to ship the same to Kissack at Lakewood, Ohio, via railway express, from Wetumpka Prison in Alabama (R. 7-8).

The petitioner objected to the introduction of any evidence for the reason that the warrant charged no offense. The objection was overruled and the petitioner excepted (R 7).

In his own behalf the petitioner testifed that the facts set out in the stipulation were substantially correct, that his defense was that the law as passed was "unconstitutional under the Federal Constitution" (R. 9), and that it violated the Federal Constitution (R. 10).

Upon the introduction of the evidence the petitioner moved that the warrant be quashed and the defendant discharged for the reason that the warrant did not show any offense on which the petitioner could be charged. The court overruled the motion and the petitioner excepted (R. 9).

The petitioner thereupon renewed his motion for the discharge of the petitioner which the court overruled, to which the petitioner excepted (R. 10).

On October 4 the petitioner filed a motion for a new trial in which he set out the following grounds:

1. That the court erred in overruling the demurrer filed by the defendant.

2. That the court erred in overruling defendant's objection to the introduction of any and all evidence.

3. That the court erred in overruling the defendant's motion for a directed verdict.

4. That the verdict is not sustained by sufficient evidence.

5. That the verdict is contrary to law.

6. That the verdict is contrary to the Constitution of the United States of America.

7. For other errors of law occurring at the trial, as indicated by the record (R. 4).

The court overruled the motion (R. 11).

Thereupon the petitioner filed a motion in arrest of judgment and for the discharge of the petitioner on the following grounds:

1. The warrant charges no offense.

2. The evidence shows that the offense with which the defendant is charged is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

3. The evidence shows that the offense with which the defendant is charged is having in his possession for sale, merchandise in the original package and is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

4. The evidence shows that the offense with which the defendant is charged is offering for sale merchandise in the original package and is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

5. The activity in which the evidence shows the defendant is engaged is a transaction in interstate commerce, which the United States alone has the power to regulate or control.

6. The defendant is denied due process of law to which he is entitled under the Fourteenth Amendment to the Constitution of the United States of America.

7. The act of Congress known as the Hawes Cooper Act (45 Stat. at L., p. 1084, Ch. 79) under which the State of Ohio claims the power to arrest and prosecute the defendant on the grounds charged in the warrant, is invalid and unconstitutional and beyond the power of the Congress to enact.

8. That the evidence fails to show that there is anything injurious, harmful or deleterious about the goods sold.

9. That there is nothing injurious, harmful or deleterious about the goods sold (R. 5-6).

The court overruled the motion in arrest of judgment and for the discharge of petitioner, to which the petitioner excepted (R. 9).

The court sentenced the petitioner to a fine of twenty-five dollars and costs of the case, to which the petitioner excepted (R. 11). The petitioner filed his bill of exceptions (R. 11) which was allowed (R. 12).

In the court of appeals the assignment of errors was as follows:

1. The court below erred in overruling the motion for a new trial by the petitioner.

2. The judgment was contrary to law and against the weight of the evidence.

3. The court erred in overruling the demurrers of the petitioner.

4. The court erred in admitting evidence over the objections of the petitioner and to which exceptions were duly noted at the time.

5. The court erred in overruling the motion of the petitioner to direct a verdict at the close of the testimony in the court below.

6. The verdict was contrary to the Constitution of the United States.

7. The court erred in overruling the motion of the petitioner to quash the warrant issued out of the court below.

8. For other errors on the face of the record prejudicial to the rights of the petitioner (R. 14-15).

The court of appeals on February 18, 1935, on consideration of all the assigned errors, found that substantial justice had been done to the petitioner and affirmed the judgment of the municipal court (R. 16).

The petitioner on March 14, 1935, filed in the Supreme Court of Ohio a petition in error (R. 17) praying that the supreme court render the judgment which the two lower courts ought to have rendered (R. 19) and that petitioner in error be restored to all things he had lost by reason of such erroneous judgments, and for all proper relief in the premises. The petitioner set out that the court of appeals erred in finding no error in the trial in the municipal court and erred in affirming the judgment of the municipal court. The petitioner set out further that the municipal court erred (a) in overruling the motion of the petitioner to quash the warrant of arrest; (b) in overruling the motion of the petitioner for a new trial; (c) in rendering judgment and imposing sentence against him; (d) in overruling the motion for a directed verdict in his favor and for his discharge; (e) in overruling the demurrer of the petitioner; (f) in admitting evidence over the objections of the petitioner and to which exceptions were duly noted at the time; (g) in overruling the motion of the petitioner to direct a verdict at the close of the testimony; and for other errors apparent on the record (R. 18, 19).

The petitioner further set out that the verdict was contrary to the Constitution of the United States (R. 19).

In its motion to certify the record the petitioner set out further that the cause of the petitioner presented a debatable quesion involving the Constitution of the United States (R. 20).

The supreme court on May 15, 1935, dismissed the petition, finding no debatable constitutional question involved (R. 29).

On May 22 the petitioner filed an application for rehearing (R. 23), setting out in the application that the record in the case raises the questions under the Constitution of the United States (a) of the right of Congress to divest itself of the right to regulate the interstate shipment of convict-made goods manufactured by convict labor in the various states of the Union; (b) of the right of Congress to divest such goods of their interstate character; and, (c) of the right of the general assembly of Ohio to enact Section 2228-1 of the Code of Ohio (R. 24).

The petitioner set out among other things that the Hawes-Cooper Act violated Article 1, Section 8, Clause 3 of, and the Tenth Amendment to, the Constitution of the United States; the petitioner contending that Congress, by divesting convict-made goods of their interstate character had unlawfully delegated its powers to the various state legislatures (R. 24).

On May 29, 1935, the supreme court denied the application for rehearing (R. 29).

In the opinion of the court of appeals the court sets out as the main contention of the petitioner (197 N. E. 605-606) the following:

> "Plaintiff in error relies mainly upon the contention that the judgment rendered by the trial court is contrary to the Constitution of the United States, and that section 2228-1, General Code, is likewise contrary to the Constitution of the United States, in that it violates article XIV, section 1, of the Amendments to the Federal Constitution, and also article I, section 8, clause 3 of the Federal Constitution." (p. 606)

In considering whether section 2228-1 of the General Code violated the 14th Amendment, the court compared the prison-made goods sold by the petitioner with the prison goods made in Ohio which were not permitted to be sold; concluding that since Ohio did not permit the products of its own prison to be sold, the fact that the petitioner was not permitted to sell like goods made in Alabama, was not a discrimination against him and consequently not a violation of the 14th Amendment.

As to the claimed conflict of section 2228-1 with the commerce clause, the court held that the Hawes-

Cooper Act resulted in placing convict-made goods which had been manufactured in another state, in the same class as convict-made goods manufactured in Ohio, and subject to the authority and control of Ohio. The court concluded that Congress had the power to

> "carry its regulation of interstate commerce to the point of prohibition of the interstate transportation of such articles as may spread evil or harm to the people of states other than the state of origin . . ."; (197 N. E. 608);

that Congress under its power to regulate interstate commerce, could place an article under the jurisdiction of the police power of a state upon its arrival in such state; and that as a result of the passage of the Hawes-Cooper Act, the State of Ohio was empowered to declare that the sale of prison-made goods in the open market would result in the destruction of the general welfare, prosperity and safety of the citizens of a state, saying:

> "It is a matter of common knowledge that industries employing free labor, required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, cannot compete successfully in the open market with prison-made goods and maintain the standard of wages which enables free labor to earn a decent living, or enables such industries to meet wage standards which have been established under national and state legislation. That prison-made goods can be sold in the open market at a price which is below the actual cost of production of manufacturers employing free labor is patent." (197 N. E. 608-9)

SPECIFICATION OF ERRORS

The Supreme Court of Ohio erred in rendering its judgment dated May 29, 1935 (R. 29) overruling petitioner's application for rehearing and in affirming the judgment of the court of appeals of the 8th district, resulting in a conviction of the petitioner under sections 2228-1 and 2228-2 of the General Code of Ohio, forbidding the sale of prison-made goods, such statutes having been enacted in pursuance of the Hawes-Cooper Act of Congress, which attempted to delegate to the legislature of Ohio the power to enact such statutes; the privileges or immunities of the petitioner, a citizen of Alabama and of the United States, being abridged by such state laws and the petitioner being deprived of property without due process of law, all as a result of such conviction, the statutes of Ohio violating Article 1, Section 8, Clause 3 of, and the 10th and 14th Amendments to, the Constitution of the United States; and the Hawes-Cooper Act not being a valid exercise of any of the powers of Congress.

SUMMARY OF ARGUMENT

The argument rests on two principal bases:

(1) In forbidding the sale of prison products in Ohio the law of Ohio is (a) in conflict with the interstate commerce clause in that it imposes a burden on an article of commerce which cannot be denominated an "outlaw of commerce"; (b) that it is in conflict with the Tenth Amendment in that, not being a police regulation, the law is an attempt on the part of Ohio to impose its own regulations on the government of the State of Alabama and on the petitioner Whitfield, its employee and agent; (c) that, being without constitutional basis, the law is in conflict with the Fourteenth Amendment in that (1) it discriminates against the petitioner Whitfield who is engaged in the sale of cotton shirts, and in favor of inhabitants of Ohio engaged in a like calling, and (2) deprives him of the right to follow the business of selling the articles forbidden by such law.

(2) The Hawes-Cooper Act of Congress is not a valid exercise of the powers of Congress to regulate interstate commerce. The goods, the movement of which Congress seeks in this instance to regulate, are neither harmful, injurious nor deleterious. The owners of the goods have a right to use the channels of interstate commerce to transport them from Alabama to Ohio, for such use is not a mere privilege to be extended or withdrawn by Congress. The framers of the Constitution and the people adopting it intended that commerce among the states should be

free and that neither Congress nor the states should have the power to impose an embargo among the states; the principal purpose in imposing on Congress the power to regulate commerce being to terminate the conflicting laws then existing among the colonies. The right of transportation includes the right of sale.

The purposes of the Hawes-Cooper Act are set out in the report of the Senate Committee considering the bill (supra, p. 52). These purposes are two: to terminate (a) the competition between prison labor and free labor, and the competition between the products manufactured in prisons and those manufactured outside prisons, and (b) to reform state prisons in the nation by terminating the contract method of using the labor of prisoners.

It is fundamental that the police powers of a state cannot be used to secure commercial advantages; that as to commerce the people of the United States are one people; that any commercial regulation attempted by Congress must bear a real or substantial relation to some part of interstate commerce.

It is, therefore, the contention of the petitioner that the combined asserted power of Congress and of the State of Ohio undertakes to achieve an end which is not authorized under the Constitution.

ARGUMENT

1.

THE LAW OF OHIO IN CONTROVERSY IS IN CONFLICT WITH THE POWER OF CONGRESS OVER INTERSTATE COMMERCE, AND THE HAWES-COOPER ACT FINDS NO PROPER BASIS IN THE CONSTITUTION.

A.

The Framers of the Constitution intended that Commerce among the States should be Free.

The following provisions of the Constitution indicate the manifest intention of the framers that the power of Congress over commerce among the states shall be advisory merely and asserted only to secure perfect freedom of trade and intercourse among the states:

> No tax or duty shall be laid on articles exported from any state (Art. 1, § 9, Cl. 5).
>
> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another (Art. 1, § 9, Cl. 6).
>
> No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: . . . . and all such laws shall be subject to the revision and control of the Congress (Art. 1, § 10, Cl. 2).

> No state shall, without the consent of Congress, lay any duty of tonnage. . . . (Art 1, § 10, Cl. 3).

In the *Passenger Cases* (1849), 48 U. S. (7 How.) 283, 12 L. ed. 702, Mr. Justice Wayne said that Article 1, Section 9, Clause 6

> "is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State." 414 (757)

This provision, he said, was intended to establish among the states

> "a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States . . ." 420 (759)

It will thus be seen that if a positive prohibition is placed on Congress in this regard, it would be extraordinary to assume that the Constitution was adopted containing the power on the part of Congress to give preference through one of its acts to the industries of one class of citizens as against the competition of others.

In *Ward v. Maryland* (1871), 79 U. S. (12 Wall.) 418, 20 L. ed. 449, the Court said that Art. 1, § 9, Cls. 5 and 6 and Art. 1, § 10, Cl. 3, were evidence to show that the framers of the Constitution intended to remove the evils of the lack of uniformity in commercial regulations which was one of the grievances of the citizens under the Confederation,

> "showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations . . . ." 431 (453)

In considering the dual powers of the states and the national government it is necessary to consider not only the context of the Constitution but the whole machinery of the government; and care must be taken in carrying out the fundamental principles, that the purpose of the framers is not frustrated. *License Cases* (1847), 46 U. S. (5 How.) 504, 519, 12 L. ed. 256, 263. It is obvious that the difficulties which the proponents of the Constitution faced would never have been overcome if the people of each state had felt that the power which they exercised over commerce with neighboring states, and which they were surrendering, would be seized by Congress and used for the same ends and purposes which resulted in the many conflicting regulations among the colonies.[1]

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[1] The problem of trade and commerce and the conflicts arising therefrom, began with the Declaration of Independence. That document declared, as one of the reasons for the action of the colonies, the act of the mother country in "cutting off our trade with all parts of the world."

B.

Clashing Sovereignty was sought to be avoided

Chief Justice Marshall said that under the form of government under which we live

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Upon the submission to the colonies of the Articles of Confederation, New Jersey in 1778 recommended that the exclusive power of regulating the trade of the United States with foreign nations, ought to be clearly vested in Congress (Journals of the Continental Congress, Vol. 11, p. 648).

The first suggestion made in Congress that the powers be strengthened so as to secure funds for the Confederation occurred on December 18, 1780 (18 J. C. C. 1162). A resolution introduced on that date was afterwards adopted, and on February 3, 1781 a resolution was adopted recommending to the several states that a five per cent. tax on imports be permitted to the United States (19 J. C. C. 112). It appeared that all the states had granted this power to Congress except Rhode Island and Georgia (23 J. C. C. 643). Rhode Island objected for the reason that it drew its chief support from commerce (23 J. C. C. 788).

Failing in its first attempt, Congress on April 18, 1783 made a further recommendation, itemizing the articles on which duties would be imposed and limiting the power of Congress to twenty-five years (24 J. C. C. 17-1, 257). This recommendation met the fate of its predecessor, seven states granting the power, other states either denying it or acceding to it in part only (30 J. C. C. 62-3).

A Committee of Congress submitted a report recommending that Article 9 of the Articles of Confederation be altered so as to delegate to Congress the power of regulating the trade of the states as well with foreign nations as with each other (28 J. C. C. 201).

The next step toward the regulation of commerce arose from the Madison resolution introduced on November 30, 1785

"....We are relieved, as we ought to be, from clashing sovereignty; from interfering

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in the House of Delegates of Virginia by Mr. Tyler, naming delegates to the Annapolis Convention. This included interstate as well as foreign commerce (Elliot's Debates[2], Vol. I, p. 147).

In the Convention of 1787 the regulation of commerce met with practically no resistance. The principal argument was whether Congress should be permitted to pass a commercial regulation without a two-thirds majority. On June 15, Mr. Patterson introduced a resolution providing for the regulation of trade and commerce both with foreign nations and among the states (House Document 398, 69th Congress, 1st Session, p. 205, Formation of the Union; herein sometimes referred to as H.D. 398). This power was doubtless intended to be contained in the proposal by Mr. Randolph submitted on June 19 to legislate in all cases in which the harmony of the United States may be interrupted by the exercise of individual legislation (H.D. 398, p. 201).

The adoption of the interstate commerce clause progressed without noteworthy comment. On August 6 it was reported without reference to the Indian tribes (H.D. 398, p. 475), the regulation of trade with Indians being added on August 22 (Ib. p. 595).

In his letter to Congress, Washington stated that the friends of the country had long seen and desired that the power of regulating commerce, among others, should be vested in the general government (H.D. 398, p. 1003).

Very few of the opponents to the constitution questioned the policy of imposing this power on Congress. Luther Martin in his address to the House of Delegates of Maryland seemed to have no objection to it (Elliott's Debates, Vol 1, pp. 382, 389). Messrs. Yates and Lansing said that this power should be delegated and yet the rights of the states reserved (Ib.. 516, 517). Edmund Randolph who failed to sign the Constitupowers; from repugnancy between a right in one government to pull down what there is

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[2] References are to the second edition, 1836.

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tion, in his report to the speaker of the House, noted that the thirteen legislatures viewed commerce under different points of view (Ib. pp. 518, 521). He had stated in the convention on June 16 that ". . . . Every one is impressed with the idea of a general regulation of trade and commerce. . . ." (H.D. 398, p. 776). Richard Henry Lee in his letter to Governor Randolph, dated October 16, 1787, expressed concern with the failure of the Convention to require a two-thirds vote in commercial matters (Elliot's Debates, Vol. I, pp. 544, 546).

In the state conventions the regulation of commerce was accepted with scarcely any debate. In Massachusetts, General Thompson, one of the opponents of the Constitution, was in favor of giving Congress power "only to regulate trade." (Elliot's Debates, Vol. II, p. 99). In Connecticut, Oliver Ellsworth referred to the tributes paid to neighboring states, which would end under the new Constitution (Ib. p. 192). In New York, Mr. Lansing commented that all the states except two had passed laws to enable Congress to regulate commerce, and these two were not indisposed to vest that power (Ib. p. 220). In the Virginia Convention, Randolph on June 6, 1788 referred to the reprisals among the states (Elliot's Debates, Vol. III, p. 104). Patrick Henry, probably the foremost opponent of the Constitution, referred to the conflicts between New York, New Jersey and Connecticut, as a result of which the latter two states paid the particular taxes of New York (Ib. p. 169). Messrs. Monroe and Grayson, opposing the adoption, were in favor of the regulation (Ib. pp. 214, 271).

In North Carolina, the commerce clause was read without observation by any member of the convention (Elliot's Debates, Vol. IV, p. 113). In South Carolina, only Charles Pinckney referred to the interfering regulations among the States (Ib. pp. 249, 250).

The Federalist indicates no opposition to the measure, re-

> an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is right in another to preserve; . . . " [*McCulloch v. Maryland* (1819), 17 U. S. (4 Wheat.), 316, 430 (4 L. ed. 579, 607)].

The argument now presented to this court is not new. In the *License Cases,* supra, counsel for the plaintiff Pierce, inquired if one of the wool-growing states could prohibit the introduction of cotton into its limits on the ground that it was more healthful for their citizens to be clad in woolens than in cotton garments? If the use of tea and coffee might not be likewise forbidden? Or the use of animal food? Or could a state engage in the whale fishery to prohibit the introduction of tallow candles? 562 (282)

It is not reasonable to suppose that the framers of the Constitution and the coventions which adopted it never intended to give Congress the power by regulating commerce to give preference to the industries

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ferring to the fruitful source of contention then existing (The Federalist, No. 7 by Hamilton, pp. 45, 46).

See also *No. 11* (Ib. pp. 76-7), *No. 22* (Ib. pp. 141-2) and *Nos. 42 and 45* by Madison (pp. 288-290, 319).

The conventions of the several states proposed a total of ninety-seven amendments. These may be classified into sixty-five different subjects of which only three relate in any way to commerce. Two of these proposed by Virginia and North Carolina provide that commercial treaties should not be ratified without the consent of two-thirds of the Senate (Elliot's Debates, Vol. III, p. 594, No. 7, Ib. Vol. IV, p. 241, No. 7). This subject had been debated in the convention (Farrand, Vol. II, p. 449).

of entire states over those of other states? If so, the representatives in Congress of the most populous states could by combining their forces pass such laws having for their object the protection of industrial activities from the competition by those of other states.[3]

In *Adair v. United States* (1908), 208 U. S. 161, 52 L. ed. 436, the Court repeated that the power to regulate

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North Carolina suggested a further amendment to Article I, Section 9, Clause 5, providing that vessels bound from one state to another should not be required to enter or pay duties or to clear from a third state (Elliot's Debates, Vol. IV, p. 243, No. 23). Pennsylvania wished this provision explained (Ib. Vol. II, p. 504, No. 9).

The outline of the Pinckney plan of the constitution contains a provision (12) that "each state may lay Embargoes in Time of Scarcity." (Farrand, Vol. II, p. 135).

History shows that no consideration was given in the several conventions to the possibility of the imposition of an embargo by any one of the states or by Congress. It is evident that such a situation was not feared.

[3] In an analysis of several of the leading cases, Senator Goff of West Virginia pointed out in the debate on the validity of the Hawes-Cooper Act, that

> ". . . . It enables 13 of the States to keep out from their borders, or what is in effect the same, to subject to prohibitive enactments, articles manufactured and having their origin in the other 35 States, not because those articles are in themselves harmful or deleterious, but because they are manufactured by a class of labor that the 13 States do not approve of."

(Congressional Record, 70th Congress, 2nd Session, December 19, 1928, Vol. 70, Pt. 1, p. 859) interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution [180 (445)].' The petitioner, Whitfield, is denied his fundamental right as a citizen of Alabama to serve his employer as best he can, so long as he does nothing that is reasonably forbidden by law as injurious to the public interests. This the Court said was a right held by Adair. [Ib. 172 (441)]. Among those fundamental rights under the Fourteenth Amendment to which the petitioner is entitled is the privilege and immunity of citizens in Ohio to sell chambray work shirts. This right does not depend on the determination of the legislature of Ohio that the products manufactured by its prisoners shall not be sold on the public market. Chambray is a gingham woven with colored warp and with filling yarns. The fact that cotton shirts are sold in Ohio may be accepted by the court as a matter of common knowledge.

There was introduced at the hearings before the Committee on Interstate Commerce of the United State Senate, 70th Congress, First Session, on Senate Bill 1940 (being the same as H. R. 7729 as passed except that the latter excepts from its provisions goods manufactured in federal prisons) that in 1923, the latest year for which information was available, the prisons of Ohio had manufactured work shirts and overalls for state use in the total amount of $250.053 (p. 68).

In *Ward v. Maryland,* supra, the court said that Ward, a citizen of New Jersey, might

> "lawfully sell, or offer or expose for sale . . . any goods which the permanent residents of the State

> might sell, or offer or expose for sale . . . . without being subjected to any higher tax or excise than that exacted by law of such permanent residents." 430 (452)

In *Hammer v. Dagenhart* (1918), 247 U. S. 251, 62 L. ed. 1101, the Court declared that the Child Labor Act (39 Stat. at L. 675. ch. 432) did not in effect regulate transportation among the states but aimed

> "to standardize the ages at which children may be employed in mining and manufacturing within the States. . . ." 272 (1105)

The act of Congress was in a two-fold sense repugnant to the constitution. It transcended the power of Congress over commerce and exerted a power as to a purely local matter to which the federal authority does not extend. 276 (1107)

C.

Police Powers of the States Cannot be used to Secure Commercial Advantages

The police powers of the states may of course be exercised when necessary for the preservation of the morals, the health or safety of the community, but the Court has declared in substance in many instances that

> "this exigency is not to be founded on any notions of commercial policy . . ."

[Mr. Justice McLean's opinion in the *License Cases,* supra, 593 (296).]

In *Brown v. Maryland* (1827), 25 U. S. (12 Wheat.) 419, 6 L. ed. 678, the Court said that

> "from the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. . . . " 438 (685)

The Court said that the states were restrained from imposing duties because

> "the interests of all would be best promoted by placing that whole subject under the control of Congress." 439 (685)

In *Veazie v. Moore* (1852), 55 U. S. (14 How.) 568, 14 L. ed. 545, the Court said that the design and object of the power of Congress over interstate commerce

> "as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain. . . ." 574 (548)

In *Hammer v. Dagenhart,* supra, the Court declared that no power was vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition; that many causes might cooperate to give one state an economic advantage over others, and that the commerce clause was not intended to give to Congress a general authority to equalize such conditions; that business done in some states may be at an economic disadvantage when compared with that in other states, but that this fact does not give Congress power

> "to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress." 273 (1106)

If Congress cannot deny transportation under such circumstances as arose in the Child Labor Case it cannot deny transportation to goods manufactured in prisons; for if the right attempted to be exerted under the Hawes-Cooper Act actually exists there is no limit to its exercise and Congress may bar transportation in such goods.

> ". . . Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed . . . ."—Brown et al v. Maryland, supra, 439 (686)

In *Baldwin v. Seelig* (1935), 294 U. S. 511, 79 L. ed. 1032, decided March 4, 1935, the Court again considered the power of the state to impose restrictions on the sale of goods in interstate commerce. Under its Milk Control Act the State of New York undertook to fix the price at which milk imported from Vermont into New York should be sold. This Court announced that New York was without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. Indeed, this principle appeared not to be disputed. Yet in spite thereof, New York asserted her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that had been paid for it to the farmers of Vermont was less than would be owing in like circumstances to farmers in New York. In the case at bar the court of appeals of the eighth district of Ohio declared as a matter of common knowledge that industries employing free labor, required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, could not compete successfully in the open market with prison-made goods and maintain the standard of wages which enabled free labor to earn a decent living, or enable such industries to meet wage standards which had been established under national and state legislation. It announced that it was patent that prison-made goods could be sold in the open market at a price below the actual cost of production of manufacturers employing free labor.

In *Baldwin v. Seelig,* supra, this Court said that such a power as claimed by New York, if exerted,

> "will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. . . . Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art I, § 8, Clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' [citing cases] Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. . . ." 521-2 (1037-8)

The Court refers to the economic conditions prior to the adoption of the Constitution. A glance at the laws of the several colonies shows that all had enacted measures intended to protect their commerce from that of their neighbors.[4]

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[4] An impost duty on nails, looking glasses, china, glass, earthern and stone ware, etc., amounting to five per cent. and an impost duty of two and one-half per cent. on other goods, wares and merchandise imported into the state was imposed. (Laws of New Hampshire, Volume 4, 1784, p. 562)

The exportation of rum, wine, spirits, etc., after Septem-

". . . The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever rela-

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ber 23, 1779, was forbidden. (Acts of the Session begun at Boston, September 8, 1779, pp. 1114-15)

An Act laying an embargo. (Described as a retaliatory act against Connecticut and Massachusetts.—Rhode Island Acts and Resolves, September 1779-February 1780, p. 9)

An Act for levying and collecting a Duty on certain Articles of Goods, Wares and Merchandise imported into this State by Land or Water. (Connecticut Acts and Laws, May 1784, p. 271)

An Act imposing Duties on the Importation of certain Goods, Wares, and Merchandise. (Laws of New York, 7th Session, 1784, Chapter 10, p. 11)

An act to lay a duty on foreign barley and malt imported into this state. (Pennsylvania Stat. at L., 1788, Vol. 13, p. 57) The reason of the law is set out and is to the effect that the importation of considerable quantities of foreign malt reduces the price of native barley and discourages the raising of the latter, and that therefore it is expedient to give due encouragement and preference to agriculture and manufacturers of Pennsylvania.

To prevent the waste of timber a duty is laid on all pipe and hogshead staves exported out of New Jersey to any of the neighboring colonies. (Laws of New Jersey, Volume 1, 1780, Chapter 9, p. 16)

An Act to prohibit the Exportation of Provisions from this State beyond the Seas, for a limited Time. (Delaware Laws, 1778, p. 3)

So serious had become the conflicts between Virginia and Maryland that the two states entered into a compact to regulate and settle the jurisdiction and navigation of the Potomac and Pocomoke Rivers, and that part of Chesapeake Bay

> tion there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. [citing cases] One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy." 524 (1039)

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lying within the territory of Virginia. (Laws of Maryland, 1785, Volume 2, Fol. 584)

An act for laying an embargo on Salt and for other purposes. (Hening's Stat. at Large, Virginia, 1779, Vol. 10, p. 149)

It is interesting to note that the legislature of Virginia later adopted a resolution as follows:

> ". . . But it cannot be conceded that the power given to congress to regulate commerce among the several States,—a power intended to prevent the products and merchandise of one state, from being subject to injurious and vexatious burdens in another, can be fairly construed to authorize a total inhibition of the sale of such products and merchandise within the limits of a state to which they did not belong. . . ." (Laws of Virginia, 1819-20, p. 119)

An Act to prohibit the Exportation of Beef, Pork, Bacon, and Indian Corn. (Iredell—Laws of North Carolina, 1778, p. 356)

An act for levying and collecting certain duties and Imposts therein mentioned, in Aid of the Public Revenue, etc. (1783) (South Carolina Public Laws, 1682-1790, p. 340)

An Act to prohibit for a certain Time the Exportation of Indian Corn. (Colonial Records of Georgia, Volume 19, pp. 140, 1770)

The court of appeals bases Ohio's rejection of the goods from Alabama in part on the wage scale and the profits of the business. (197 N. E. 608-9)

D.

Neither Congress nor the States have the power to impose an Embargo among the States.

Congress is without power to impose an embargo which will affect only a part of the states. *Groves v. Slaughter* (1841), 40 U. S. (15 Pet.) 449, 506, 10 L. ed. 800, 821. In Mr. Justice McLean's concurring opinion, he said that

> ". . . The power vested in Congress to regulate commerce among the several States was designed to prevent commercial conflicts among them. . . . Ohio could not proscribe the productions of the south, nor the fabrics of the north, . . ." 507-8 (822).

In the *Passenger Cases,* supra, the Court said that to permit a state to impose a tax on interstate passengers on a steamboat or on a railroad

> "would enable a State to establish and enforce a non-intercourse with every other State." 407 (754)

And in *Crandall v. Nevada* (1867), 73 U. S. (6 Wall.) 35, 18 L. ed. 745, the Court declared that if the states could tax a railroad passenger

> "one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all trans-

portation of passengers from one part of the country to the other." 46 (748)

In *State Freight Tax* (1873), 82 U. S. (15 Wall.) 232, 21 L. ed. 146, the Court declared that if the states were permitted to tax persons or property passing through them by levying a tax upon their transportation, the result would be that

> "commercial intercourse between States remote from each other may be destroyed. . . " 280 (163)

Railroad Company v. Husen (1877), 95 U. S. 465, 24 L. ed. 527, is an apt illustration of the attempt of a state to exclude the products of other states. An act of Missouri excluded Texan, Mexican or Indian cattle from the state between March 1 and November 1 of any year; provided that transportation owners should be responsible for all damages resulting from a disease called the Spanish or Texas Fever, should the same occur along the line of such transportation. The act was not a police regulation as it did not require an inspection. No distinction was made between diseased cattle and such as were not diseased. The court declared that such a statute was beyond the power of a state to enact, that to hold otherwise would be to ignore one of the leading objects which the Constitution was designed to secure. 473 (531)

And in *Mobile v. Kimball* (1881), 102 U. S. 691, 26 L. ed. 238, it is stated that without the power of Congress to regulate interstate commerce there would be no security against conflicting regulations of different states

> "each discriminating in favor of its own products and citizens, and against the products and citizens of other States." 697 (239)

In *Schollenberger v. Pennsylvania* (1898), 171 U. S. 1, 43 L. ed. 49, a law of Pennsylvania forbade the sale of oleomargarine as an article of food. Congress in 1886 had recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself. The Court said that oleomargarine, if properly and honestly manufactured, was conceded to be a healthful and nutritious article of food; and the fact that it may be adulterated would not afford a foundation absolutely to prohibit its introduction in the state. 15 (54)

The general rule to be deduced from the decisions of the Court was

> "that a lawful article of commerce cannot be wholly excluded from importation into a State from another state where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food." 12 (53)

Oleomargarine being a legitimate subject of commerce among the states, no state had a right totally to prohibit its introduction in its pure condition from without the state under any exercise of its police power. As a matter of state policy a state could determine whether to permit in many cases the manufacture and sale of articles within the state, or entirely to forbid such manufacture and sale

> "so long as the legislation is confined to the manufacture and the sale within the state." 16-17 (55)

The Court declared that when Congress taxes an article and recognizes it as a proper subject of commerce, a state could not totally exclude it because the state might choose to decide that for the purpose of preventing the importation of an impure or adulterated article the state would not permit the introduction of the pure and adulterated article within its borders upon any terms whatever. 19 (56)

Congress recognizes that cotton goods form a legitimate article of commerce. It has undertaken in the Agricultural Adjustment Act (48 Stat. 31, 7 USCA § 601, et seq.) to impose a processing tax on the manufacture of such goods. Congress having recognized that the states may be engaged in the manufacture of goods from the commodities, including cotton, regulated in the Adjustment Act, provided in the amendment that processings which are exempt from tax by reason of the fact that such processings "are done by or for a State, or a political subdivision or an institution thereof", shall be imposed on other processors so as to effect the parity sought under the Adjustment Act. [Amendment of August 27, 1935, § 9 (b) (1) (B)]

So, with one hand Congress by the Hawes-Cooper Act undertakes to permit states to outlaw the sale of cotton work shirts and with the other extends to the states the privilege of manufacturing them free from the processing tax.

A law of a state prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color, was held invalid as being in necessary effect prohibitory. The Court declared that the permission to sell when accompanied by the imposition of a condition which, if complied with, would "effectually prevent any sale, amounts in law to a prohibition." *Collins v. New Hampshire* (1898), 171 U. S. 30, 34, 43 L. ed. 60, 61.

The states may not burden instruments of interstate commerce by

> "forbidding the introduction into the State of articles of commerce generally recognized as lawful, ..." *Houston and Texas Central Railroad Company v. Mayes* (1906), 201 U. S. 321, 328, 50 L. ed. 772, 775.

United States v. Delaware & Hudson Co. (1909), 213 U. S. 366, 53 L. ed. 836, grew out of the commodity clause of the Hepburn Act, prohibiting railroad companies engaged in interstate commerce from transporting certain articles or commodities manufactured, mined or produced by them, or in which they have any proprietary interest, except as might be necessary for their own use in the conduct of their business as common carriers. The Court upheld the power of Congress to enact the law but stated that it did not rest such power

> "upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities . . ." 415 (852)

In considering the Webb-Kenyon Act (37 Stat. at L. 699) the Court made it plain that the exceptional nature of intoxicating liquors was the basis upon which the exceptional power exerted must rest and afforded no ground

> "for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." *Clark Distilling Company v. Western Maryland Railway Company and West Virginia* (1917), 242 U. S. 311, 332, 61 L. ed. 326, 341.

In *Hammer v. Dagenhart,* supra, the Court declared that the power of Congress to regulate interstate commerce was to control the means by which commerce is carried on,

> "which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities . . ." 269, 270 (1105)

In discussing the difference between the regulation of foreign commerce and that among the states, in *Atlantic Cleaners & Dyers v. United States* (1932), 286

U. S. 427, 76 L. ed. 1204, the Court declared that in the regulation of foreign commerce an embargo is admissible

> "but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states . . . ." 434 (1208)

The Supreme Court of Ohio has heretofore declared that the state had no power to pass a law requiring a dealer in prison-made goods to obtain a license from the secretary of state before selling such goods. *Arnold v. Yanders* (1897), 56 Ohio St. 417, 47 N. E. 50). The court held that it was

> "not competent for a state legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the state by unfriendly legislation. . . ." 51

The basis of the opinion of the court was that Congress has the power to declare any article an outlaw of commerce; whereupon the states are permitted to treat the article as if produced within its borders. This is clearly an erroneous conception of the powers of Congress.

E.

nterstate Commerce Embraces the Sale of Goods after they reach their Destination

Without the right to sell an article in interstate com-nerce, the article is deprived of a part of, if not all, its alue. In *Crandall v. Nevada,* supra, the Court said that f the right of a citizen to pass through a state is one uaranteed to him by the Constitution, such right must e as sacred from state taxation as the right derived by he importers from the payment of duties "to sell the oods on which the duties were paid." 47 (748)

In *State Freight Tax,* supra, the Court stated that it ould be absurd to suppose that the transmission of the ubjects of trade from the state to the buyer or from the lace of production to the market, was not contemplated, or without that there could be no consummated trade ither with foreign nations or among the states. 275 161)

The City of Titusville, Pennsylvania, adopted an ordi-ance requiring agents soliciting orders of persons other han manufacturers and licensed merchants, to take out license and pay therefor. The Court stated that if the tate could tax for the privilege of selling to one class t could for selling to another or to all; that in either case he tax was a restriction on the right to sell and a burden n lawful commerce between the citizens of two states; hat it was as much a burden upon commerce to tax for he privilege of selling to a minister as it is for that of elling to a merchant. The Court commented that the pictures and picture frames which the defendant was engaged in selling were open to no condemnation and were "unchallenged subjects of commerce." *Brennan v. Titusville* (1894), 153 U. S. 289, 298, 38 L. ed. 719, 721

In *Houston and Texas Central Railroad Company v. Mayes,* supra, the Court said that states may not burden instruments of interstate commerce by prohibiting the sale of articles recognized as lawful after their introduction, commenting that this question, among others, has been

> "so frequently settled that a citation of authorities is unnecessary. . . ." 328 (775)

Commerce does not end with the transportation of goods

> "but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. . . . " *Dahmke-Walker Milling Company v. Bondurant* (1921), 257 U. S. 282, 290, 66 L. ed. 239, 244.

F.

The Right of the Citizen to engage in Commerce is not a Privilege granted by Congress

The power to regulate commerce does not impose on Congress the power to close the channels of commerce. The privilege of interstate commerce is not granted by the people to Congress. It is one of the rights retained by them, subject merely to regulation. In instances where such regulation is necessary or proper for the protection of interstate commerce, Congress is empowered to use what may be termed its police power in connection therewith.

Answering the assertion in *The Employers' Liability Cases* (1908), 207 U. S. 463, 52 L. ed. 297, that because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of commerce, the Court said that to state such a proposition was to refute it; that it assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, or in other words, with the right to legislate concerning matters of purely state concern; that such an assertion rested upon the conception that the Constitution

> "destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. . . ." 502 (311)

Such a contention was declared by the court not to be well founded. What the framers of the Constitution undertook to do was

> " . . . to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand . . . " *The Minnesota Rate Cases* (1913), 230 U. S. 352, 398, 57 L. ed. 1511, 1540-1.

The conviction of the necessity of imposing upon Congress the regulation of interstate commerce

> "sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other . . . ." Ib. 398 (1540-1)

G

Congress can Exercise Police Powers in Interstate Commerce only on "Outlaws of Commerce."

The power through which Congress has heretofore undertaken to prohibit the use of the instruments of interstate commerce has been in the nature of a police power and has been limited to what have been denominated "outlaws of commerce." *Hoke and Economides v. United States* (1913), 227 U. S. 308, 323, 57 L. ed. 523, 527. In *Hipolite Egg Company v. United States* (1911), 220 U. S. 45, 55 L. ed. 364, the Court stated that it must be remembered that the Court was dealing with

> "illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration and which law punishes them (if we may so express ourselves) and the shipper of them . . ." 57 (368)

In the case at bar the law does not undertake to libel the goods nor to punish the State of Alabama as the shipper. If an article be debased by adulteration, or misrepresented by false branding, Congress may exercise its prohibitive power. *Hoke and Economides v. United States,* supra, 322 (527).

It could not be disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful.

> " . . . The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guaranties such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, . . . " *Clark Distilling Company v. Western Maryland Railway Company and West Virginia,* supra, 332 (341).

The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses is no longer open to question.—*Caminetti v. United States* (1917), 242 U. S. 470, 491, 61 L. ed. 442, 455. There is a difference

> "between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not

> be applied to pig iron, steel rails, or most of the vast body of commodities." *Wilson v. New, et al.* (1917), 243 U. S. 332, 347, 61 L. ed. 755, 733.

In regulating interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin, Congress is "merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks v. United States* (1925), 267 U. S. 432, 436-7, 69 L. ed. 699, 701.

In *Baldwin v. Seelig,* supra, the Court stated that there is little, if any, analogy between restrictions as to intoxicating liquors and as to milk.

> ". . . In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin . . . ." 528 (1041)

H

A State Cannot Prevent the Shipment from that State of an Article produced within its Borders.

In two cases this Court has declared that no state may enforce a law forbidding the transportation from the state of a legitimate subject of commerce. *Haskell v. Kansas Natural Gas Company* (1912), 224 U. S. 217, 56 L. ed. 738. In *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, 67 L. ed. 1117, the question was likewise whether a state could withdraw a natural re-source from interstate commerce. The Court again announced the purpose of the interstate commerce clause which was

> "to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it . . ." 596 (1132)

It was held that a state law, whether of the state where the gas was produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce and a prohibited interference. 596-7 (1132)

I

The Power to Regulate Commerce was Imposed on Congress in order to avoid Conflicting State Laws.

The object of vesting in Congress the power to regulate commerce among the states was to insure uniformity of regulation "against conflicting and discriminating state legislation." *Mobile v. Kimball,* supra, 697 (239), Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of these evils. *Houston, East and West Texas Railway Company v. United States* (1914), 234 U. S. 342, 350, 58 L. ed. 1341, 1347-8.

J

As to Commerce the People of the United States are one People.

Commerce among the states is a unit, and in respect of that commerce this is one country, and we are one people. *United States v. Knight Co.* (1895), 156 U. S. 1, 32, 39 L. ed. 325, 336.

The Constitution

> "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig,* supra, 523 (1038).

K

The Regulation attempted by Congress must bear a real or substantial relationship to some part of Interstate Commerce.

The power of Congress to regulate interstate commerce does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. *Second Employers' Liability Cases* (1912), 223 U. S. 1, 47, 56 L. ed. 327, 345; *Adair v. United States,* supra, 178 (444). In these cases, the attempted exercise by Congress of the power to regulate the liability of interstate carriers for injuries occurring in intrastate commerce and to forbid the discharge of an employee of an interstate carrier because he had joined a labor union respectively, was held to lack any real or substantial relation to interstate commerce. How much more distantly removed from such relationship is the sale in Ohio of cotton goods made in the prisons of Alabama?

2.

THE ATTEMPTED ENFORCEMENT OF SECTIONS 2228-1 AND 2228-2 OF THE GENERAL CODE OF OHIO, AIDED BY THE HAWES-COOPER ACT, IS VIOLATIVE OF THE TENTH AMENDMENT.

The State of Alabama through its agent Whitfield, the petitioner, has undertaken to sell in Ohio part of the products of its cotton mills which are being operated by prisoners. The law of Ohio forbids the sale of such goods on the ground that prison labor is used in their manufacture. It is obvious that if free labor were used in the manufacture of cotton goods in mills owned by the State of Alabama, Ohio would have no objection to the sale of such products within its borders. Alabama is therefore required, if the Hawes-Cooper Act and the law of Ohio are valid, to reconstruct its system and, if it desires to sell its products in Ohio, to employ free labor only. In the *Child Labor Case* the Supreme Court said that the Act of Congress forbidding interstate commerce in the products of child labor (39 Stat. at L. 675) was not a proper regulation of interstate commerce and also violated the Tenth Amendment. If the Hawes-Cooper Act (as does the Act of Congress of July 25, 1935)[5] prohibited interstate commerce in prison products, this Court would not hesitate to declare it invalid. The same end as to commerce is reached by the permissive feature of the Hawes-Cooper Act and the forbidding feature of the Ohio law. The result is the same. The Court's judgment should likewise be the same. Both the Act and the law are necessary parts of the plan and are "but means to an unconstitutional end"—*United States v. Butler,* Jan. 6, 1936. If Congress lacks the power to impose this embargo on Alabama's products unless Alabama selects labor to suit the whims of Congress, and if Ohio lacks the power to stop the sale in Ohio of goods shipped from Alabama in interstate commerce, it is obvious that a combination of the two governments brings no added power to either. The prison products of Alabama are barred from sale in Ohio and in order to overcome that bar, Alabama must change the type of labor in its cotton mills. This cannot be required. Whitfield, the agent, cannot be punished for asserting his rights under the Constitution of the United States to perfect a sale in Ohio in interstate commerce.

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[5] On July 25, 1935 Congress passed an act entitled "An Act to Prohibit the Interstate Transportation of Prison-Made Products in Certain Cases", which prohibits the receipt, possession, sale or use of such products, either in the original package or otherwise, in violation of any law of the State into which they are shipped; requiring all packages containing such products to be labeled, subjecting the same to seizure and forfeiture and imposing a fine of not more than $1,000.00 for violation of the law.

In *Veazie Bank v. Fenno* (1869), 75 U. S. (8 Wall.) 533, 19 L. ed. 482, the Court said that it may be admited that the reserved rights of the states, such as the right "to employ all necessary agencies for legitimate purposes of state government" are not proper subjects of the taxing power of Congress. 547 (487). Alabama proposes to employ as an agency for the reformation of its convicts manual labor in a cotton mill, which results in the manufacture of cotton products. It proposes to sell those products in interstate commerce. Congress proposes to use its power to regulate commerce to bring about a termination of the employment of this agency by the State of Alabama in order, according to the Senate Report discussed on page 52, herein, to protect labor and industry from what Congress chooses to believe is unfair competition.

In *The Collector v. Day* (1870), 78 U. S. (11 Wall.) 113, 20 L. ed. 122, the Court said that

> " . . . the means and instrumentalities employed for carrying on the operations of their [state and federal] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government. . . . . " 125 (126)

If the means and instrumentalities of the states cannot be destroyed through the exercise of the taxing power of the federal government, it results that they cannot be destroyed through the exercise of any other power.

> " . . . . any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" 127 (126-7)

Every addition of power to the general government involves a corresponding diminution of the governmental powers of the states. "It is carved out of them." *Ex Parte Virginia* (1880), 100 U. S. 339, 346, 25 L. ed. 676, 679.

Prior to the adoption of the Constitution the states required no aid from any external authority to manage their domestic affairs. Congress gained no such power under the Constitution. There can obviously be no claim by those insistent on an extension of the powers of Congress that any provision of the Constitution authorizes any interference by Congress with the states in the administration of their governments and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The states have absolute freedom from all external interference in the exercise of their legislative, judicial and executive authority, all of which are necessarily involved in the trial, conviction, punishment and reformation of one charged with and convicted of a violation of law. Nor can the laws of Ohio extend to Alabama.

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on

> no one of the others, and is bound to yield its own views to none. . . . "

Kansas v. Colorado (1907), 206 U. S. 46, 97, 51 L. ed. 956, 975.

3.

THE LAW OF OHIO OUTLAWING THE SALE OF PRISON MADE GOODS DEPRIVES PETITIONER OF THE RIGHT TO EARN HIS LIVELIHOOD BY A LAWFUL CALLING, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The petitioner, Whitfield, was engaged in the sale of cotton shirts. He had chosen to pursue this calling which is not an uncommon occupation. It was protected by the 14th Amendment. *Butchers' Union Company v. Crescent City Company* (1884), 111 U. S. 746, 762, 28 L. ed. 585, 588-9.

In *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. ed. 832, referring to the 14th Amendment the Court said:

> " . . . The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or

> avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." 589 (835-6)

The right to follow useful occupations is a property right which is protected by the 14th Amendment from impairment or destruction by the state. *Adams, et al. v. Tanner* (1917), 244 U. S. 590, 596-7, 61 L. ed. 1336, 1344; *Meyer v. Nebraska* (1923), 262 U. S. 390, 399, 67 L. ed. 1042, 1045; *Tyson v. Banton* (1927), 273 U. S. 418, 443, 445, 71 L. ed. 718, 728, 729; *Fairmont Creamery Company v. Minnesota* (1927), 274 U. S. 1, 9, 71 L. ed. 893, 897.

The fact that the statute may have been enacted under the claimed police power of the state does not free it from the requirements of the Fourteenth Amendment. *Southern Railway Company v. Virginia* (1933), 290 U. S. 190, 196, 78 L. ed. 260, 265.

4.

THE REPORT OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE.

What is the end or object of the Hawes-Cooper Act? Is it legitimate? Is it within the scope or consistent with the letter and spirit of the Constitution? The end may be tested by the history of the times and the evil which the legislation was intended to remedy. These are plainly indicated by the Committee Report [S. Rept. No. 344, 70th Cong., 1st Sess., see Senate Reports, Vol. 1, same session].

> *Andrew Aldridge v. Nathaniel F. Williams* (1845), 44 U. S. (3 How.) 9, 24, 11 L. ed. 469, 476
>
> *United States v. Union Pacific Railroad Company* (1875), 91 U. S. 72, 79, 23 L. ed. 224, 228
>
> *American Net and Twine Company v. Roland Worthington* (1891), 141 U. S. 468, 473-4, 35 L. ed. 821, 824
>
> *Church of the Holy Trinity v. United States* (1892), 143 U. S. 457, 465, 36 L. ed. 226, 230
>
> *Joseph R. Binns v. United States* (1904), 194 U. S. 486, 495-6, 48 L. ed. 1087, 1090-1
>
> *Standard Oil Company of New Jersey v. United States* (1910), 221 U. S. 1, 50, 55 L. ed. 619, 641
>
> *Duplex Printing Press Co. v. Emil J. Deering* (1921), 254 U. S. 443, 474-5, 65 L. ed. 349, 360
>
> *Railroad Commission of Wisconsin v. Chicago,* B. & Q. R. Co. (1922), 257 U. S. 563, 588-9, 66 L. ed. 371, 383
>
> *George Van Camp & Sons Company v. American Can Company and the Van Camp Packing Company, Inc.* (1929), 278 U. S. 245, 253-4, 73 L. ed. 311, 313
>
> *Federal Trade Commission v. Raladam Company* (1931), 283 U. S. 643, 650-1, 75 L. ed. 1324, 1330-1

Although admitting that the penitentiary problem is a problem for the state, that

> "the factors that enter into its adjustment are so many and so varied as to make it essentially a State problem, and no Federal impediment should

> stand in the way of any State which seeks to determine its own prison affairs and the regulation of the sale of prison products,"

the report proceeds frankly to outline for the states a solution of their problems. An analysis of the report shows that the principal evil sought to be remedied was the competition of prison products with those of free labor, and the competition of prison industries with those of manufacturers representing more than two billion, five hundred million dollars in investments. The General Federation of Women's Clubs was brought into the situation. The Federation was interested in bringing about "a proper reform in the prisons of the Nation" which the report stated was being frustrated by the inability of states to make effective their local laws burdening the sale of prison-made products shipped in interstate commerce. Pertinent paragraphs from the committee report are as follows:

> *"Supported by Three Great Elements of Society*
>
> "Three distinct and powerful elements in American life earnestly indorsed this measure, each from a separate motive and different viewpoint.
>
> "The American Federation of Labor urged the passage of this bill through its properly constituted leaders, and has without exception indorsed the measure through its State organizations. (P. 1)[6]
>
> "The viewpoint of labor is that under existing conditions the products of convicts are permitted to flow through channels that bring about a ruin-

---

[6] References are to an official copy of the report contained in Senate Reports, Vol. I, 70th Cong. 1st. Sess.

ous competition with the labor of free American citizens, 5,000,000 of whom the labor organization represents.

"From an entirely different viewpoint manufacturers, representing more than $2,500,000,000 in investments and employing both union and non-union labor, were heard by the committee urging the passage of the measure for the reason, they stated, that under existing conditions the continuous production of prison-made products in certain centralized industries creates a condition by which the entire competitive market is demoralized and under which the products of free manufacturers are forced into ruinous competition with goods made by convicts.

"Wholly aside from these divergent reasons, the General Federation of Women's Clubs, through their properly constituted representatives, and speaking for some 14,000 affiliated branches in the 48 States, urged before the committee the passage of this act on the broad humanitarian ground that under existing conditions all attempts to bring about a proper reform in the prisons of the Nation were being frustrated by the legal impediment under which State laws are made ineffective through interstate commerce.

"The blind also appeared, through properly authorized representative of the national organization looking to the betterment of conditions for the blind, in support of this measure. It was brought out that convict labor is dominating the broom industry, which industry is the best suited for those so afflicted.

"In addition to these were representatives of the prison reform organizations with branches in the States.

"It is significant that all five of these elements declared that their ultimate object was the same, to wit, the continuous employment of the convict for the benefit of the State, for his own welfare, and rehabilitation,[7] and for the care of his family, and the removal of his products from the field of ruinous competition with both free labor and invested capital." (P. 2)

* * * * *

"That prisoners must be employed is one of the principles upon which this bill is founded. As a result of the passage of this measure the prisoner of the future may not only be employed but may be employed in such a way as to bring about, through scientific methods, his possible rehabilitation for reentrance into society."

" *'State Use' and 'States' Use' Plans*

"Testimony was given to the committee concerning the State-use system now in existence in some of the larger States of the Union, and in each case conditions under such system were found satisfactory.

"The State-use system is that under which the products of convict labor are diversified with the view to the needs of State institutions, the thought being that under proper surveys as to such needs and under proper diversification of industry in the prisons the output of the penitentiaries will meet the needs of the institutions of the State.

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[7] For a vivid picture of the "corroding idleness" existing today among prison population as a result of the Hawes-Cooper Act and under the codification of industry, see American Prisons—Houses of Idleness, by James V. Bennett, Assistant Director of Bureau of United States Prisons, published in The Survey, April, 1935, p. 99.

"But in addition to the thought underlying the State-use system there was outlined to your committee the States' use plan under which products of a prison in one State may be sold to the institutions of another State, and under a systematic prison management the industries of certain States would be diversified to meet the requirements of certain other nearby States.' Such diversification would be based not only upon the needs of adjoining States but upon the proximity of raw-materials as well. Such a system also takes into consideration the employment of prisoners in a given State in such industries as will prove most beneficial to the prisoners when paroled or released in that State. But whatever the State or groups of States may do is not the province of this bill, which simply enables them to do as they please. (P. 3)"

The report pays its respects to the evils of prison contracts, with which of course Congress has nothing to do. The contractor

> "is the middleman profiting both from the State and the prisoner. He should be eliminated as a factor in the prison problem. (P. 3)

* * * * * *

"The bill therefore does not interfere with the rights of States, but it does assist in preserving the right of self-determination for each State.

" . . . . the control and direction of prisoners should not be delegated to anyone except responsible officials of the State, and no contractor or selling agency should have anything to do, directly or indirectly, at any time with the prisoners' supervision. (P. 4)

* * * * * *

"The disparity in wages paid prisoners and those paid free labor need not be discussed, as the facts borne out by testimony are matters of common knowledge.

* * * * * *

"Two Years Given for Readjustment

"The committee is not unmindful of the practical problem presented in certain States of the necessity of changing present systems. It is this practical problem to which the conscientious wardens and prison officials who appeared before the committee will have to give their attention. It is much the simpler program to go on as at present. To change means the employment of time and study in the reorganization of prison management.

"Realizing this the committee amended the bill as introduced by providing that it shall not take effect until two years from date of passage.

"This amendment meets the desires of those who favor the principle of the bill, but who are anxious for time necessary to meet the practical problem in their own State.

"The 2-year clause in the bill will make it possible for the prison management of any State to make such surveys and such reorganization as may be necessary.

"This bill is a necessary step in a national program of prison reorganization which began some

> years ago with the abolition in a majority of States of the obnoxious contract system, but which has been delayed and hampered by the existence of the legal impediment to which reference has been made.
>
> "In those States where the more modern system of prison employment has been adopted through legislative enactment, prison officials reported to the committee that representatives of the General Federation of Women's Clubs, the American Federation of Labor, and the manufacturers had been cooperating to make the new system effective.
>
> "The same zeal and activity on the part of these three elements of American life may be confidently relied upon in the future to assist the Government of any State in which the people are desirous of putting into effect a new system of penal conduct." (P. 5)

From a document of directors of penal institutions accompanying the report we observe that:

> "It is estimated that the amount of goods produced by convict labor represents not more than one-twentieth of one per cent of the products of outside labor—the amount of the competition is infinitesimally small." (Congressional Record 70th Congress, 2nd sess., Vol. 70, Pt. 1, p. 677, 2nd Col. Lines 20-24.)

Thus the power of the Government of the United States is invoked to protect free labor and the billions of invested capital from the labor of the prisoner. Shall we see the day when this protection renders a sentence to hard labor impossible of enforcement?

CONCLUSION

The law of Ohio forbidding the sale of prison-made goods, unsupported by the Hawes-Cooper Act, would doubtless have been declared invalid by the Supreme Court of Ohio, as was a kindred statute in the case of *Arnold v. Yanders,* supra. But what the state lacked the power to do when that case came before the court, Congress could not give it the power to do in 1934 by passing the Hawes-Cooper Act.

The judgment of the Supreme Court of Ohio should therefore be reversed, the petitioner Whitfield ordered discharged, and the several states freed to reorganize and reconstruct their systems so as to put their prisoners to work, after the confusion which they have lately suffered as a result of the invalid attempt on the part of Congress to interfere in the regulation of such important local, governmental activities.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 377

ASA H. WHITFIELD,
Petitioner,
vs.
THE STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SUPPLEMENTAL BRIEF FOR THE PETITIONER.

PERRY W. TURNER,
WM. LOGAN MARTIN,
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Of Counsel.

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SUPPLEMENTAL BRIEF FOR THE PETITIONER.

The Federal Question under the Fourteenth Amendment that the Privileges or Immunities of the Petitioner Had Been Abridged by the Law of Ohio was Properly Raised.

Upon the argument of the above case on February 7 doubt was expressed that the petitioner had raised in the court below the question that the law of the State of Ohio under which he was convicted had abridged the privileges and immunities to which he was entitled as a citizen of the United States. An examination of the record shows that the warrant under which the petitioner was arrested was issued on October 2 (R. 2-3); that he was tried on October 3 (R. 7) and that upon the examination of the petitioner as a witness in his own behalf the following questions were asked and answered as indicated:

"Q. And your defense is that the law, as passed, is unconstitutional under the Federal Constitution?

"A. Yes.

"Q. That it violates the Federal Constitution?

"A. Yes."

After the defendant was convicted he filed his petition-in-error in the Court of Appeals (R. 14), the seventh paragraph of which (R. 15) is to the effect that the verdict was "contrary to the Constitution of the United States of America."

While in his motion in the Municipal Court in arrest of judgment he sets out specifically that he was denied due process of law to which he was entitled under the Fourteenth Amendment, the Court of Appeals nevertheless, evidently considered that the question of the abridgment of the privileges or immunities of the petitioner had been properly raised and in its opinion discussed this question (*Whitfield* v. *State*, 197 N. E. 605, 606 (1935)), saying:

> "It is urged that section 2228-1, General Code, when it provides that 'goods, wares or merchandisé, manufactured or mined wholly or in part in any other State by convicts or prisoners,' shall be excluded from the open market in the State of Ohio, abridges the privileges and immunities of citizens of the United States, in that it deprives a citizen of the United States, who has merchandise made by convicts of another State, from competing with convict-made goods in the State of Ohio. p. 606.

* * * * * * *

> "The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff in error, to the effect that section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other States from competing with convict-made goods in the State of Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions." p. 607.

Section 237 of the Judicial Code (28 U. S. C. A., § 344) provides in paragraph (b) for the jurisdiction of this Court by the issuance of a writ of certiorari

> "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; * * *"

In *The Bridge Proprietors* v. *The Hoboken Company*, 68 U. S. 116 (1863), the question arose whether under the twenty-fifth section of the act of Congress of 1789 (1 Stat. at L. 73, 85) providing that

> "where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States * * *",

it was necessary for the petitioner-in-error to have set out the special clause of the Constitution supposed to render the Act invalid. The Court declared that this was not so necessary, saying:

> "It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.' " P. 142.

The Court stated in *The Victory,* 73 U. S. 382 (1867), that the point to be raised

> "need not appear by express averment, but if the record shows by necessary intendment that the point was decided, it is sufficient, * * *" P. 384.

In *Murray* v. *Charleston,* 96 U. S. 432 (1887), the Court said:

> "* * * The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits 'where

> is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case, it was necessarily involved, without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly." P. 441.

In *Spencer* v. *Merchant,* 125 U. S. 345 (1887), the question was the validity of an assessment. The owner contended that the assessment was unconstitutional and void because it was an attempt by the legislature to validate a void assessment without giving the owner of the lands assessed an opportunity to be heard upon the whole amount of the assessment. The Court said that the owner

> "thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. * * *" P. 352.

Wabash Railroad Company v. *Pearce,* 192 U. S. 179 (1903), involved a shipment of curios originating in Japan which was delivered to the ultimate carrier, the defendant railroad company, the company being responsible under traffic agreements for the payment of duties amounting to $264 upon the entrance of the shipment into the United

States. The plaintiff, Pearce, brought an action in replevin and the railroad answered that it was

> " 'entitled to the first lien on said goods under the laws of the United States for the amount of said duties.' * * *" P. 185.

The Court said that although no single statute was mentioned, the railroad

> "claimed a lien on the goods under and by virtue of the laws of the United States, and thus directly called for a determination of a Federal right. * * *" P. 185.

The Railroad Company contended that the payment of the duties exacted under the statutes of the United States operated not only to release the goods but to give the carrier the right and privilege of maintaining possession until reimbursed these duties.

> "* * * This right and privilege [of possession] was specially set up and claimed by the railroad company. Whether it existed was the substantial question presented and decided. And whether rightly or wrongly decided the presentation of the question, the claim of the right and privilege was, when denied by the state court, sufficient to give this court jurisdiction." Pp. 185-186.

In *Mallinckrodt Works* v. *St. Louis,* 238 U. S. 41 (1915), the defendant-in-error filed a motion to dismiss the appeal on the ground that the Federal questions set up in the Supreme Court were not raised in the trial court or in the Supreme Court of the State with sufficient definiteness to comply with section 237 of the Judicial Code. The manner in which the questions were raised in the court below appears in 249 Mo. 702, Grounds (8) and (9), as set out on p. 708. Ground (8) set out that the refusal of the court below to grant the peremptory instruction for the plaintiff-in-error denied to it and its officers

> "the equal protection of the laws guaranteed to them by the 14th Amendment to the Federal Constitution, and denied to defendant and its officers their rights and immunities thereby secured, * * *" p. 708.

Ground (9) was based on the alleged error of the court in not finding for the plaintiff-in-error because as to the affidavit required of defendant's officers

> "the immunity is not complete and not commensurate with the constitutional guaranty to the officers of the defendant against the giving of a self-incriminating affidavit * * *" p. 708.

The Supreme Court of Missouri, in discussing ground (8) set out that the contention of the plaintiff-in-error was that the challenged section (10322) violated the Fourteenth Amendment of the Constitution

> "in that it denies to the appellant and its officers the equal protection of the laws by requiring them to make the affidavit mentioned therein, and at the same time exempting therefrom all 'partnerships, individuals or association of individuals who may be engaged in the same character of business.' " P. 733.

The court referring to a prior case which it had decided likened the position of the plaintiff-in-error to the corporation in such prior case whose position was that the challenged sections were

> " ' * * * in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.' " P. 733.

The Missouri court proceeded to quote from such prior case, setting out the distinction between individuals and corporations and stated that such case decided against the contention of the plaintiff-in-error the question of equal protection of the laws. It appears that while the plaintiff-in-error in ground (8) raised the question of the denial of equal protection and of rights and immunities, the matter of due process was not referred to until the case reached the Supreme Court of the United States. There, upon a motion to dismiss, that court said that it appeared from the opinion of the court below that the question of equal protection had been sufficiently treated and that this conferred jurisdiction upon the Supreme Court and that the motion to dismiss must be denied. On page 52 of the opinion the Supreme Court said that assuming, without deciding, that all the grounds upon which the validity of the challenged section were attacked in the Supreme Court were properly raised in the State court, the Supreme Court would discuss them, and thereupon proceeded to announce that the plaintiff-in-error had not been denied due process (pp. 52-5).

In the case at bar the petitioner filed demurrers to the warrant (R. 3) on the ground that the warrant did not charge an offense "all as set out in the brief hereto attached". The attached brief is not made a part of the record. It is referred to again at the top of page 5 and made a part of the motion for a new trial.

In the petition-in-error in the Court of Appeals (R. 14) grounds are set out to the effect, among others, that the municipal court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony in the case and for the further reason that the verdict was contrary to the Constitution of the United States. An examination of the testimony, a consideration of the several provisions of the Constitution which may be invoked, together with an examination of the lengthy opinion of the Court on the question of abridgment of the petitioner's privileges and immunities, would indicate that this question had been sufficient ly raised either in the briefs accompanying the demurrers, in the oral argument, or elsewhere, so as to require the Court of Appeals of Ohio to decide the question.

Under Section 1483 of the Code of Ohio (1934) the opinion of the Court of Appeals in this case, having been published in 49 Ohio App. 530 (197 N. E. 605), it "shall be recognized by and receive the official sanction of any court within the state". While the opinion is not contained in the record, a certified copy has been lodged in the clerk's office. For convenience, it has been inserted in the brief of the petitioner for writ of certiorari (pp. 26-36).

By the settled course of the decisions of this Court under the existing Judiciary Acts of the United States, this Court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the state court.

Kreiger v. *Shelby Railroad Company,* 125 U. S. 39, 44 (1888);

Murdock v. *Memphis,* 87 U. S. (20 Wall.) 590, 633 (1874);

McManus v. *O'Sullivan,* 91 U. S. 578, 579 (1875);

Philadelphia Fire Association v. *New York,* 119 U. S. 110 (1886).

In *Jones National Bank* v. *Yates,* 240 U. S. 541 (1915) the plaintiffs, who were unpaid depositors, while invoking no Federal statute by name in their suit to recover damages from the directors of the bank which had suspended payment, set out facts which clearly brought the action under the National Bank Act. It was insisted in the Supreme Court that the writ should be dismissed in the view that the plaintiffs-in-error (the depositors) sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants-in-error. The Court said that

> "* * * The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. * * *" P. 550.

The Court set out that the facts averred by the plaintiffs were transactions falling within the purview of the National Bank Act and that the plaintiffs' rights must be measured accordingly, that

> "* * * If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction." P. 551.

In view of the foregoing authorities, of the clear statement by the Court of Appeals of Ohio to the effect that the privileges and immunities of the petitioner had not been denied, the petitioner contends that this question is properly raised.

Respectfully submitted,

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THE STATE OF OHIO.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Petitioner here seeks a writ of certiorari as set forth in his petition, relying upon the point that the Hawes-Cooper Act of Congress (45 Stat. at L. 1084; Chapt. 79, U. S. C. Title 49, Sec. 65) is not authorized by the interstate commerce clause or by any other provision of the Constitution of the United States, and that in the trial and conviction of the petitioner he was thus denied due process of the law and equal protection of the laws. Petitioner also relies upon the point that the Ohio statutes, Sections 2228-1 and 2228-2 of the General Code of Ohio, prohibiting the sale in the open market in Ohio of prison made goods made in other states, thus placing such goods under the same restrictions as those so made in Ohio, is in conflict with the interstate commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3).

Obviously, if the Hawes-Cooper Act is invalid, the Ohio statutes must fall, and obviously if the Hawes-Cooper Act is invalid, petitioner was denied due process of law and equal protection of the laws. The one basic point then upon which petitioner relies is the constitutionality of the Hawes-Cooper Act.

Alabama is here making a second attempt to invalidate this act,—the first having been made in Alabama v. Arizona, et al., 291 U. S., 286, 292, wherein Alabama, was denied leave to file bill of complaint against nineteen states, including respondent state. In that application and brief filed in support thereof, opposing counsel set forth all arguments now advanced in support of the petition here.

ARGUMENT.

Point 1. Granting of petition discretionary.

Point 2. Validity of Hawes-Cooper Act has been settled by this court.

POINT 1.

Granting of Petition Discretionary.

A review of the decision of the Supreme Court of Ohio by this court is entirely within its sound judicial discretion and will be granted only where there is a showing of a special and important reason therefor. Rule 35, Section 5. In the instant case, the one substantive question of law involved has already been determined by this court adversely to the contentions of petitioner, as will be hereinafter shown; and there is accordingly no showing made to justify the granting of the writ of certiorari prayed for by petitioner.

POINT 2.

Validity of Hawes-Cooper Act Has Been Settled by This Court.

The Hawes-Cooper Act, leaving to the states the question of the sale in the open market of prison made goods and affording protection to those states which prohibit such sale from the inroads of such goods imported from other states is substantially identical in its terms and purpose with the Wilson Act, 26 Stat., 313, c. 728, which made the same provision with respect to intoxicating liquor in states which prohibited the sale of such commodity. The Wilson Act was attacked as to constitutionality and upheld by this court in the case of Wilkerson v. Rahrer, 140 U. S., 545. The decision in this case has been so repeatedly approved and followed by this court beginning with Plumley v. Massachusetts, 155 U. S., 461, and ending with James Clarke Distilling Co. v. Western Maryland Ry. Co., 242 U. S., 211, that it is unnecessary here to quote the pertinent language of the decision. It is sufficient to direct the court's attention to the first, fifth and sixth branches of the headnotes:

> "1. The Act of Congress of August 8, 1890, that intoxicating liquors transported into a state or territory shall be subject to the laws of the state or territory enacted in the exercise of its police powers, is constitutional and valid.
>
> 5. Congress has power to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case.
>
> 6. Congress had the power to enact the law of August 8, 1890, and in doing so it has not attempted to delegate the power to regulate commerce, nor to exercise any power reserved to the states."

The petitioner attempts to sustain the position that since the prison made work shirts in question are not in themselves "harmful, injurious or deleterious", that therefore the Rahrer case, supra, is not controlling. Petitioner cites many decisions of this court in which he apparently recognizes that the power delegated to Congress to regulate commerce was subject to the reserved police powers of the state and that Congress had authority to permit a state to prohibit the sale within its boundaries of any article in interstate commerce which endangered "the welfare or the morals of its people". The assumption appears to be that since prison made goods may not in themselves be exceptional in their nature that therefore the sale in the open market of such goods imported from without the state, into a state where the products of its own prisons may not be so sold, presents no exceptional situation which Congress might have the power to remedy. A mere statement of the proposition refutes its validity. Had there been no previous recognition by this court of the necessity of safeguarding the freedom of labor, the petitioner might be said to be presenting here a case of first instance. But in Baily v. Alabama, 219 U. S., 219, this court unequivocally expressed itself upon that matter, wherein it is said that:

> "There is no more important concern, than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

That interstate commerce in prison made goods is a proper subject of regulation by Congress, where Congress does not, as in the case here, usurp state police powers, but rather enables them to be effectual, is no longer debatable.

In Brooks v. United States, 267 U. S., 432, this court upheld an act forbidding the transportation in interstate commerce of a motor vehicle known to have been stolen. It could be said with equal lack of force as contended by petitioner that there is "nothing harmful, injurious or deleterious" about a perfectly good motor vehicle just because it has been stolen.

Again, in Champion v. Ames, 188 U. S., 321, this court held constitutional an act prohibiting the transportation in interstate commerce of lottery tickets. Like prison made shirts, there is "nothing harmful, injurious or deleterious" about a lottery ticket in itself. **The harm** recognized by this court **arises from the use** to which such tickets are put. In the instant case the harm **arises from the use** to which these prison made shirts are put, to wit, their sale in Ohio in competition with such merchandise made by free labor, and in violation of the state statutes relating thereto, thus rendering ineffectual the benefits sought to be accomplished by the state in the valid exercise of its police power in protecting its industries and regulating its prisons. The case of the apparently harmless ticket and the apparently harmless shirt may not be distinguished.

Again, in the case of State, ex rel., Silz, v. Hesterberg, 211 U. S., 31, we have the same restriction upheld as to game birds and animals. The decisions of this court sustaining the constitutionality of the Hawes-Cooper Act leave its validity no longer open to question.

This court in Brooks v. United States, supra, clearly established the power of Congress to enact the Hawes-Cooper Act in the following language:

> "Congress can certainly regulate interstate commerce to the extent of **forbidding** and punishing **the**

> **use of such commerce as an agency to promote** immorality, dishonesty, or **the spread of any evil or harm to the people of other states from the state of origin.** In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." (Boldface ours.)

Petitioner relies chiefly upon the so-called Child Labor case, Hammer v. Dagenhart, 247 U. S., 251, in which this court held invalid an Act of Congress which "aims to standardize the ages at which children may be employed in mining and manufacturing within the states" (39 Stat. at L. 675, Chap. 632), regardless of the laws of any states from which or into which such products were to be shipped. The distinction between that act and the Hawes-Cooper Act here under consideration is apparent on its face. This court was not there concerned with an act which subjected goods made by child labor to the laws of the states into which they were shipped, and no state prohibited the sale on the open market of such goods. Had the act which Congress there had under consideration so provided, there might be some analogy drawn here. The Child Labor Act there held unconstitutional, however, prohibited the transportation in interstate commerce of goods made by child labor, thus prohibiting the sale of such goods in all states, regardless of state regulation thereof, and thus usurping a state function. The Child Labor Act itself set up the standard of labor, thus usurping a purely local state power. That this was the controlling element of the majority decision of this court is evident. At the outset of the majority opinion it is said at page 269:

> "The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work, more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p. m. or before the hour of 6 o'clock a. m.?"

Throughout the opinion, the decision of this court is grounded upon the attempt of Congress to usurp a state function and destroy a state power which it was powerless to do. It is sufficient to direct the court's attention to the following language:

> "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. * * *
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. * * *
>
> And in Dartmouth College v. Woodward, 4 Wheat., 518, 629, the same great judge (Marshall) said:
>
> 'That the framers of the Constitution did not in-

> tend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."
>
> * * * * * * * * * * * *
>
> The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal powers in all matters intrusted to the nation by the Federal Constitution.
>
> * * * * * * * * * * * *
>
> To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.
>
> * * * * * * * * * * * *
>
> In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority."

It is submitted that the foregoing case, if at all pertinent, directly supports the constitutionality of the Hawes-Cooper Act. The Hawes-Cooper Act supports the authority of the states over matters purely local; it does not usurp that authority. It does not restrain the states in the regulation of their own industries but assists those which seek to protect the general welfare of their people by prohibiting the sale of prison made goods from the influx in interstate commerce of such goods from other states which do not see fit to so protect their people and regulate their prisons. The Hawes-Cooper Act accordingly removes an impediment in the enforcement of such state laws, just as did the Wilson Act. In the Rahrer case, supra, this court said as to this, at page 564:

> "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The Child Labor Tax case, 259 U. S., 20, needs no extended comment other than to say that the case is in the same category as Hammer v. Dagenhart, supra. The court expressly held that it could not be distinguished from that case, since the Child Labor Tax Law there under consideration constituted an attempt by Congress "to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution."

Petitioner also raises the question of invalid delegation of power by Congress. This point was raised in the cases of Wilkerson v. Rahrer, supra, and Silz v. Hesterberg, supra, and completely disposed of. It is unnecessary to comment upon this point further than to say that it has been decided adverse to petitioner and is no longer subject to debate.

CONCLUSION.

The harm or evil or the demoralizing effect of the unrestricted sale of prison made goods in those states which have in the valid exercise of their police power prohibited the sale of such goods, the fact that the prohibition of the sale of prison made goods is within the police power of the states, and the wisdom or expediency of legislation being matters solely for the Legislature, are points which have all been recently presented to this court in the brief of the attorney general of Montana in the case of Alabama v. Arizona, supra, and it is accordingly believed to be unnecessary to unduly lengthen this brief by citing the decision of this and other courts in support thereof.

Attention should be directed to the fact that the Supreme Court of Ohio is not the only state court of last resort which has considered the validity of the Hawes-Cooper Act to be no longer open to question. The Supreme Court of Wisconsin on December 4, 1934, in the case of State v. Whitfield, 257 N. W., 601, considered this question and sustained its validity.

The court's attention is also respectfully invited to the decision of the Ohio Court of Appeals of the Eighth Appellate District of Ohio quoted in full in petitioner's brief sustaining the constitutionality of the Hawes-Cooper Act upon well grounded decisions of this court. It follows that the Ohio statute must necessarily constitute a valid exercise of the police power of the state.

It is submitted in conclusion that the Supreme Court of Ohio dismissed the petition in error filed therein seeking a review of the decision of the Court of Appeals "**for the reason no debatable constitutional question is involved in said cause.**" Transcript of record, page 29. The court of last resort of Ohio considered the question of the constitutionality and validity of the laws here under attack to be so well established as to be not debatable and to not justify a written opinion.

It is respectfully submitted, therefore, that the petition for a writ of certiorari to the Supreme Court of Ohio should be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

No. 377.

ASA H. WHITFIELD,
Petitioner,
vs.
THE STATE OF OHIO.
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio.

BRIEF FOR THE RESPONDENT.

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IN THE

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OCTOBER TERM 1935.

No. 377.

ASA H. WHITFIELD,
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vs.
THE STATE OF OHIO.
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals of Cuyahoga county, for the Eighth District of the state of Ohio (see petition for writ of certiorari, p. 26), is reported in 49 Ohio App., 530, 197 N. E., 605. The order of the Supreme Court of Ohio dismissing the petition in error, R., 29, is found in 129 Ohio State, 543, 196 N. E., 164.

JURISDICTION.

The application of the petitioner herein for a rehearing was denied by the Supreme Court of Ohio on May 29, 1935, R., 29.

The petition for writ of certiorari to the Supreme Court of Ohio was filed August 19 and was allowed on October 14, 1935, R., 29. The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended (Sec. 344, Title 28, U. S. C. A.).

QUESTIONS PRESENTED.

(1) Whether the act entitled "An act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases," approved January 19, 1929, (45 Stat., 1084, 49 U. S. C. A., Ch. 2A, Section 65), and known as the Hawes-Cooper Act (see Appendix), is violative of the Commerce Clause and the Tenth and Fourteenth Amendments of the Constitution of the United States.

(2) Whether, in view of the provisions of the Ohio Constitution and legislation enacted thereunder, and in view of the enabling act of Congress, the Hawes-Cooper Act, supra, Sections 2228-1 and 2228-2 of the General Code of Ohio (see Appendix), forbidding the sale on the open market in Ohio of prison-made goods and imposing penalties for the violation thereof, are in conflict with

the above noted provisions of the Constitution of the United States. Section 41, Article II of the Constitution of Ohio and Sections 2228, 2230, and 2231, General Code of Ohio, are also pertinent and are quoted in the Appendix.

SUMMARY OF ARGUMENT.

I. This court has repeatedly considered conditions confronting Congress when passing upon its acts to meet those conditions.

II. Power of Congress to regulate commerce is supreme.

III. Definition of the power to regulate interstate commerce.

IV. Congress in the regulation of interstate commerce has sought, wherever possible, to remove impediments to the operation of state laws, and such acts have been consistently upheld by this court.

V. Exercise of power to regulate may, when necessary, take the form of prohibition.

VI. The extent to which a power of Congress to regulate may be exercised, is within the discretion of Congress.

VII. The Hawes-Cooper Act delegates no power to the states to regulate interstate commerce, and has been so construed.

VIII. The child labor case supports the constitutionality of the Hawes-Cooper Act.

IX. Origin of commodities does not exempt interstate commerce in them from regulation by Congress.

X. Under its police power a state may prohibit the sale on the open market of prison-made goods.

XI. The provisions of the Ohio statutes are reasonable regulations designed to promote the public welfare.

XII. The enforcement of the statutes involved does not violate the Tenth Amendment.

XIII. The Ohio law prohibiting the sale of prison-made goods on the open market is not violative of the Fourteenth Amendment.

XIV. Conclusion.

ARGUMENT.

I.

THIS COURT HAS REPEATEDLY CONSIDERED CONDITIONS CONFRONTING CONGRESS WHEN PASSING UPON ITS ACTS TO MEET THOSE CONDITIONS.

In determining the questions presented in this case we inquire first as to the occasion for the legislation and its history.

Nebbia v. New York, 291 U. S., 502, 515, 78 L. Ed., 940, 944;
United States v. Anderson, 9 Wall., 56, 65, 19 L. Ed., 615, 617;
Costanzo v. Tillinghast, 287 U. S., 341, 345, 77 L. Ed., 350, 353.

We must look to contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative bodies to determine the evil which it is designed to remedy.

United States v. Union Pacific R. Co., 91 U. S., 72, 79, 23 L. Ed., 224, 228;
United States v. Laws, 163 U. S., 258, 262, 41 L. Ed., 151, 153;
United States v. Missouri Pacific Railroad Co., 278 U. S., 269, 278, 73 L. Ed., 322, 377.

(a) Congressional History Discloses Early Recognition of Evils Resulting from Sale of Prison Made Goods on the Open Market.

As far back as the Fifty-eighth Congress a bill similar to the **Hawes-Cooper Act** was favorably reported in the house of representatives. Subsequently similar bills were favorably reported in the house of representatives in the Fifty-ninth, Sixty-first, and Sixty-second Congresses. In the Sixty-third Congress a bill in almost identical language as this act was passed by the house of representatives by a vote of 305 to 2, and favorably reported in the senate.

The committee in reporting this bill in the senate stated: "The necessity for such legislation arises from the fact that each state endeavors to shunt the products of its convict labor upon other states, and thus fails to meet its own responsibility." (Report No. 771, U. S. Senate, 63rd Congress, 2nd Session, p. 2.)

In the first session of the Sixty-fourth Congress substantially the same bill was reported in the house of representatives. In that report the committee enumerates some of the evils of the unregulated commerce in prison-made goods, which it was sought to overcome by legislation. At that time (1916) the committee stated that, "While the number of convicts in state prisons is small compared with free labor, their output, being sold for less than goods made under normal wage conditions, suffices to blight many industries."

The report further pointed out that of all leather whips and whiplashes, other than buggy whips, 90 per cent of the total production was prison-made; that in blacksnake whips and cheap whiplashes, 99 per cent were prison-made, and this industry had been almost entirely abandoned to the prisons; that fully 90 per cent of saddletrees were prison-made, only special patented shapes being attempted by outside manufacturers; that of stove hollow ware—the cheaper grades of kettles, skillets, etc. —99 per cent were prison products, the industry having been abandoned by the outside manufacturers, who as stove producers had become largely the jobbers of prison hollow ware; that in many lines manufacturers had been compelled by prison competition to entirely change their line of products, and in cases where that could not readily be done they had been forced to suspend business altogether.

The committee further pointed out that:

> "Twenty per cent of the regular shoe factory output must compete with convict-made goods; the competing output of the convict factories is but one-eighth of this 20 per cent (16 per cent), yet it serves to demoralize the whole industry.
>
> "Five states contracted their convict labor to one furniture-making firm in 1905, the competition being severely felt in the industry. The same is true of cooperage in the Chicago market, where it was estimated by the Illinois state commissioner of labor that 67.8 per cent of all pork barrels, beef and lard tierces, and lard kegs used at the packing establishments were made in Joliet prison, and it was shown that many private concerns had been forced out of business and those remaining pushed close to the

> deficit line. In shirts, overalls, handkerchiefs, hosiery, and other similar lines exploited convict labor, at wages (the return to the state) rarely equal to one-half the pay of free labor, has seriously damaged the field of the manufacture and industry. * * *
>
> "The demoralization of industries and their abandonment to prison manufacture, as in the case of certain kinds of brushes, of cheap stoves and hollow ware must drive workmen out of their trades and away from their homes and wonted means of livelihood, to which they have been accustomed and compel them to learn new trades, or to sink to the level of unskilled labor." (Report No. 75, House of Representatives, 64th Congress, 1st Session.)

In 1924 the secretary of commerce appointed a representative committee to act as an advisory body and to collaborate with the department of commerce in making a study of the prison-industry problem, and the Congress had before it the facts set out in the report of this committee. (Domestic Commerce Series, No. 27, Department of Commerce. See Congressional Record, Vol. 70, Pt. 1, p. 656.) In its conclusions the committee stated that certain of the major factors in the normal cost of production which must be met by all manufacturers are entirely absent in the production of prison products, and that the effect of placing on the open market a volume of goods produced below normal costs is to bring about a disorganization of the markets, and that, "The increase in prison production which is predicted, will make it difficult, if not impossible, for manufacturers employing free labor to continue operation in trades where the prison output becomes heavy."

It was further stated in the report:

"Evidence of the fact that prison-made goods can enter any market at will against products of free industries has been amply provided by the report, Convict Labor in 1923, issued by the United States department of labor. Developments in the marketing of garments, which according to that report made up $18,526,686 of the $44,843,355 worth of prison products sold on the open market in 1923, furnish further evidence of the disturbance caused by contractors or state officials in charge of prison industries.

"The broom industry reports a similar situation. Robert C. Norman, of New York City, testified before the congressional committee on labor March 5, 1926, that out of 50,000 tons of broomcorn usually cut per annum at least 12,500 tons are worked up in prisons. The binder twine and the chair industries report similar conditions. Other trades are affected but not to such a large proportional extent.

"The complaint is made that these goods are sold without identification and the buyer does not know, in most cases, that he is buying prison-made products." (P. 2.)

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"* * * Furthermore, experience seems to indicate that it is difficult for any one state to bring about the solution of its own marketing problems unless it can control prison products from other states when they enter its borders." (P. 12.)

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"The question, however, has been raised whether any state has a right to support its prisoners out of the profits realized on sales to the citizens of other states, received either directly or indirectly through a private contractor." (P. 12.)

The report also showed that certain items usually entering into production costs, such as rent, many overhead items, selling costs and factory labors are absent. It was stated to be the practice of those dealing in prison-made goods to place either false or misleading labels upon them, so as to conceal from, or to mislead the prospective customer as to their origin.

(b) To Enable the States to Enforce Their Own Laws for the Protection of Their Public Welfare, Congress Passed the Hawes-Cooper Act on January 19, 1929.

The committees reporting the **Hawes-Cooper** bill took note of certain abuses which could only be controlled by the uniform regulation of interstate commerce in prison-made goods, which the Congress alone was empowered to make. Their reports state:

> "The testimony before your committee brought to light certain evils of present conditions.
>
> "It was shown that in one state where the people of the state, through their Legislature, enacted a law requiring the labeling of convict-made goods, the prisoners in the penitentiaries of that state were engaged in the manufacture of shirts and shoes which were sent out into other states to be dumped on the competitive market bearing labels of misrepresentation.
>
> "In the same state the shield of the United States and the lettering 'U. S.' were fraudulently placed upon the shoes for the purpose of misrepresentation and deceit. Such false labels were being placed upon products by the prisoners themselves, and in one instance they were admittedly placed on products 'at the direction of the warden.'

"State laws against such deception and fraud are ineffective. State labeling laws and similar legislation are unenforceable, and the objectionable conditions which exist are permitted to continue only because states can not enforce their own statutes.

"The state, representing the public opinion of that state by enacting laws through its legislators to prevent the sale of convict-made goods, is powerless to enforce its own will, because other states use its market as a dumping ground for surplus convict-made goods.

"With the result that New York (for illustration) regulates the sale of convict-made goods, and the products of its own convicts are eliminated from the state market, but at present the prison contractor may dump upon the New York market the products of convicts from other states.

"The state is rendered helpless, its own laws are defeated and the prison contractor, in defiance of the public opinion of that state, secures a personal profit, first, from the state of origin; second, from the prisoner; and third, from the market of the state which is unable to protect itself.

"The result is apparent. The products of convicts are not sold upon the market where state use is in force and yet every other state where the contract system is used may do the thing that the law of that state prohibits.

"The bill therefore does not interfere with the rights of states, but it does assist in preserving the right of self-determination for each state."

* * * * * * * * * *

"However desirous any state in the union may be of putting an end of the contract system, its efforts are futile for the reason that it can not rid itself of misbranded and falsely labeled products sent into its borders by prison manufacturers who hold themselves out as legitimate manufacturers.

> "As a result of present conditions it is only natural that those who are profiting from the prison contract system will seek to interfere with any movement in any state looking to the adoption of a different system.
>
> "The disparity in wages paid prisoners and those paid free labor need not be discussed, as the facts borne out by testimony are matters of common knowledge." (Report No. 344, U. S. Senate, 70th Congress, 1st Session, p. 4.)

The Congress adopted the **Hawes-Cooper Act** as an aid to the states in correcting the evils which its numerous investigations, and those of other departments of the government showed could not be expected to right themselves, and which, it was asserted, the states did not have the power to correct owing to the conditions existing under the dual form of our government.

This act merely prescribes regulations for accomplishing the introduction and incorporation of prison-made goods into and with the mass of the property of the state, thereby removing what had been urged as an impediment to the enforcement of state laws in respect to such goods.

II.

POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE IS SUPREME.

It must be admitted that if this statute is a legitimate exercise of the power delegated to the Congress to regulate commerce among the states, the conviction of the petitioner must stand.

It is well, therefore, to inquire as to what power over interstate commerce is vested in Congress by the Constitution; and to what extent the courts have said this power may be exercised. The provision of the Constitution giving the Congress such power is found in Article I, Section 8, Clause 3, which invests Congress with the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The power conferred upon Congress to regulate interstate commerce is plenary, and it is settled by all the authorities that the power extends to every part of interstate commerce and to every instrumentality and agency by which it is carried on. And except as to those police regulations of the states which incidentally affect interstate commerce, such commerce is subject only to the regulations which may be imposed by Congress and until Congress has legislated on the subject it is to be free of any restraints.

Robbins v. Shelby County Taxing District, 120 U. S., 489, 30 L. Ed., 694;
Leisy v. Hardin, 135 U. S., 100, 34 L. Ed., 128.

Probably the leading case under the commerce clause of the Constitution is **Gibbons v. Ogden,** 9 Wheat, 1, 6 L. Ed., 23. Referring to the power of Congress to regulate commerce, Chief Justice Marshall said:

> "This power, like all others vested in Congress, is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." P. 196 (70).

This doctrine has been repeatedly affirmed by this court.

> **Addystone Pipe & Steel Co. v. United States,** 175 U. S., 211, 44 L. Ed., 136;
> **Champion v. Ames,** 188 U. S., 321, 47 L. Ed., 492;
> **Atlantic & P. Teleg. Co. v. Philadelphia,** 190 U. S., 160, 47 L. Ed., 995;
> **Northern Securities Co. v. United States,** 193 U. S., 197, 48 L. Ed., 679;
> **Simpson v. Shepard,** 230 U. S., 352, 57 L. Ed., 1511;
> **Sligh v. Kirkwood,** 237 U. S., 52, 59 L. Ed., 835;
> **Robbins v. Shelby County Taxing District,** supra;
> **Second Employers Liability Cases,** 223 U. S., 1, 56 L. Ed., 327.

III.

DEFINITION OF THE POWER TO REGULATE INTERSTATE COMMERCE.

It is said in **Gibbons v. Ogden, supra,** that commerce:

> "describes the commercial intercourse between nations, and parts of nations, in all its branches, **and is regulated by prescribing rules for carrying on that intercourse.**" P. 189-190 (68). (Boldface ours.)

In **Northern Securities v. United States, supra,** it was held with respect to the power of Congress to establish rules by which interstate commerce shall be governed, that: "in some circumstances regulation may properly take the form and have the effect of prohibition." P. 335 (699).

And in the case of **United States v. E. C. Knight Co.,** 156 U. S., 1, 12, 39 L. Ed., 325, 329, the court said:

> "The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed * * *."

And in the same opinion Mr. Chief Justice Fuller stated for the court that:

> "The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints." P. 11 (329).

In **Mobile County v. Kimball,** 102 U. S., 691, 696, 26 L. Ed., 238, 239, it was stated that the power to regulate commerce

> "authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety."

In the **Second Employers Liability Cases, supra,** it was stated to be the power

> "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." P. 47 (345).

And in **Brown v. Maryland**, 12 Wheat., 419, 6 L. Ed., 678, it was said that an essential part of the regulation of commerce, and the principal object of it, is to prescribe the regular means for accomplishing the introduction and incorporation of imported articles into and with the mass of the property in the state. P. 448 (688).

IV.

CONGRESS IN THE REGULATION OF INTERSTATE COMMERCE HAS SOUGHT, WHEREVER POSSIBLE, TO REMOVE IMPEDIMENTS TO THE OPERATION OF STATE LAWS, AND SUCH ACTS HAVE BEEN CONSISTENTLY UPHELD BY THIS COURT.

The recognition by Congress of local laws and local policies in respect to matters within the jurisdiction of the federal government is neither new in theory, nor recent in practice.

Although regulations over commerce includes the regulation of the qualifications and services of pilots, the first Congress assembled under our Constitution, by an act approved August 7, 1789, provided that until further legislation upon the subject by the Congress all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall be subject to the state laws then in force or thereafter enacted by the states wherein such pilots may be. (1 Stat., 54, 46 U. S. C. A., 211.)

Statutes enacted by various states pursuant to this authority have been sustained.

> **Cooley v. Port Wardens,** 12 How., 299, 13 L. Ed., 996;
>
> **Olsen v. Smith,** 195 U. S., 332, 49 L. Ed., 224.

By an act approved June 5, 1794 (1 Stat., 378), the Third Congress made provision for the laying of duties and licenses for selling wines and foreign liquors by retail, and requiring that retail dealers in such commodities obtain licenses. This statute provided "that no license shall be granted to any person to sell wines, or foreign distilled spirituous liquors, who is prohibited to sell the same by the laws of any state."

An act of February 25, 1799 (1 Stat., 619), required that United States officers observe quantities and other restraints established by any state respecting vessels arriving in, or bound to, any port or district thereof.

The Thirteenth Congress by an act of August 2, 1813 (3 Stat., 72), defined retailers in imported goods, wares or merchandise, as well as in wines and liquors, and required that every retailer of such commodities shall obtain a license from the collector appointed by virtue of the act. This statute provided also "that no license shall be granted to any person to sell wines, distilled spirituous liquors, **or merchandise**, as aforesaid who is prohibited to sell the same by any state."

An act approved March 3, 1825 (4 Stat., 115), provided for the punishment in accordance with the laws of the state in which the place is situated, of offense committed in places under the jurisdiction of the United States, where the offense was not theretofore punishable by the courts of the United States.

By an act approved July 3, 1866 (14 Stat., 82), regulations were made by the Congress for the transportation of explosives. Among other provisions of the statute was one that the regulation so made would not be construed as to prevent any state from prohibiting or regulating the traffic in, or transportation of, such explosives, or from prohibiting the introduction thereof into the state for sale, use or consumption therein.

And by an act approved May 9, 1902 (32 Stat., 193), it was provided that imitation cheese or imitation butter transported from one state into another, shall upon arrival within the limits of the state of destination, be subject to the operation and effect of the laws of such state, and shall not be exempt therefrom by reason of being introduced into the state in the original package or otherwise.

Thus, we have had a **national policy**, established with the beginning of our government, designed **to prevent the superior powers of the federal government from impeding the operation of state laws in matters affecting the welfare of the citizens of the several states.**

These policies have always been sustained by this court whenever they have been called into question. Indeed, it would appear that this court has suggested this course in certain instances. In the case of **Robbins v. Shelby County Taxing District**, **supra**, involving a Tennessee statute prohibiting the sale by drummers and other persons not having a regular licensed place of business within the taxing district, of goods, wares and merchandise, by sample, except upon payment of a privilege tax, it was said by the court:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand." P. 498 (698).

In the case of **Bowman v. Railway Co.**, 125 U. S., 465, 31 L. Ed., 700, the court stated:

> "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of **commodities** between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases **by the express permission of Congress.**" P. 485 (707). (Boldface ours.)

This suggestion is repeated several times in the opinion.

And in the case of **Leisy v. Hardin, supra,** it was said that:

> "a subject matter within the exclusive jurisdiction of Congress 'is not within the jurisdiction of the police power of the state, **unless placed there by congressional action.**" (Citing cases.) P. 108 (132). (Boldface ours.)

* * * * * * * * * *

> "Undoubtedly it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, * * * **the responsibility is upon Congress**, so far as the regulation of interstate commerce is con-

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cerned, **to remove the restriction upon the state in dealing with imported articles of trade within its limits,** which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." P. 123-124 (137). (Boldface ours.)

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And the court concluded:

> "Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in **Gibbons v. Ogden,** 9 Wheat, 1, 238, 6 L. Ed., 23, 80, in 'a frank and candid cooperation for the general good.' "

The same idea was expressed in **Lyng v. State,** 135 U. S., 161, 34 L. Ed., 152. In this case the court said:

> "The same rule that applies to * * * the products * * * of any state, applies to **all commodities** in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. **It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances."** P. 167 (153). (Boldface ours.)

And in **Schollenberger v. Pennsylvania,** 171 U. S., 1, 43 L. Ed., 49, involving oleomargarine, Mr. Justice Peckham stated for the court:

> **"In the absence of congressional legislation,** therefore, the right to import a lawful article of commerce from one state to another continues until a

> sale in the original package in which the article was introduced into the state.'' P. 23 (57). (Boldface ours.)

It may be observed that in these opinions the court referred consistently to "articles of commerce," "articles of trade" and the "transportation of commodities."

It will also be observed that the court did not declare that a state is under all conditions denied jurisdiction to control imported articles. On the contrary, the court contemplated a condition where the state might act. The decisions only established the principle that "in the absence of congressional permission'' it cannot do so. These repeated and emphatic assertions of this court, even before the issue was squarely presented to it, and the decisions of this court hereinafter discussed, we submit, unmistakably establish the right of Congress to place within the jurisdiction of a state, upon importation, articles or transactions over which the state has jurisdiction except for the exclusive power of Congress to regulate commerce.

V.

EXERCISE OF POWER TO REGULATE MAY, WHEN NECESSARY, TAKE THE FORM OF PROHIBITION.

This court has recognized in a long line of decisions that regulation as to certain articles and practices can only be accomplished by absolutely prohibiting the use of the facilities of interstate commerce in the transportation of such articles. One of the cases illustrating the application of this principle is **Champion v. Ames, supra**, which sustained an act of Congress prohibiting the importation into the United States or the transportation from one state to any other state of "**any paper, certificate or instrument**" purporting to be or represent a lottery ticket. The Supreme Court in sustaining this absolute prohibition of interstate commerce in lottery tickets stated:

> "We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.'' P. 354 (500).
>
> "If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people of all the states,** and under

> the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?" P. 355 (501). (Boldface ours.)

We emphasize that the court did not base its decision upon the ground that the "paper, certificate or instrument" was inherently harmful or deleterious. In fact such article in itself is no more harmful or deleterious than the articles involved in this case. The decision was based upon the fact that many states of the union had recognized "the evils that inhere in the raising of money in that mode," and therefore, the action of Congress

> "only supplemented the action of those states—perhaps all of them—which for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. **We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.** We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce." P. 357, P. 358 (502). (Boldface ours.)

The Congress has enacted a statute prohibiting the transportation of stolen motor vehicles in interstate or foreign commrece. That act was sustained by this court in **Brooks v. United States**, 267 U. S., 432, 69 L. Ed., 699, although a stolen automobile is not in itself more inherently harmful or noxious than one not stolen. It is the transportation and sale in interstate commerce of stolen automobiles, just as it is the transportation and sale in interstate commerce of prison made goods in states restricting such sale, that causes the evil. Mr. Chief Justice Taft, speaking for the court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the **spread of any evil, or harm to the people of other states from the state of origin."** P. 436 (701). (Boldface ours.)

In 1912 Congress saw fit to exercise its powers to regulate interstate commerce in a far more drastic and questionable manner than in the passage of the **Hawes-Cooper Act.** We refer to the act of July 31, 1912 (37 Stats., at L. 240; U. S. C. A., Title 18, Sec. 405), which act, without reference to whether the several states regulated or prohibited the showing of prize fight films, expressly prohibited the importation into the United States and the transportation in interstate commerce of such films. This court, in the case of **Weber v. Freed,** 239 U. S., 325, 60 L. Ed., 308, upheld the constitutionality of that act. Although the court was there concerned with a case of importation of a prize fight film from a foreign country, the courts throughout the country have considered the Weber case as dispositive of all questions of constitutionality of that act. See **United States v. John-**

ston, 232 Fed., 970, and **Rose v. St. Clair,** 28 Fed. (2d), 189, both cases relating to transportation of prize fight films in interstate commerce. It is respectfully but emphatically submitted that if Congress may prohibit the importation into Ohio of prize fight films from another state, Ohio permitting the showing of such films, it assuredly may not be contended that Congress is without power to permit Ohio to place foreign prison made goods in the same category with its own prison made goods.

In the case of **Hipolite Egg Co. v. United States,** 220 U. S., 45, 55 L. Ed., 364, it was held to be within the regulatory power of Congress to prohibit the transportation in interstate commerce of adulterated **or misbranded** articles of food. This legislation was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States,** 227 U. S., 308, 57 L. Ed., 523, the prohibition by congressional enactment of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of state laws forbidding prostitution and the same argument was urged against its validity, that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by this court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime.

It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the states." P. 321 (527). (Boldface ours.)

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"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." P. 322 (527).

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"Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibition must be applied. We may illustrate again by the pure food and drug act. Let an article * * * be misrepresented by false branding, and Congress may exercise its prohibitive power." P. 322 (527).

VI.

THE EXTENT TO WHICH A POWER OF CONGRESS TO REGULATE MAY BE EXERCISED, IS WITHIN THE DISCRETION OF CONGRESS.

There are many instances where the Congress has exercised its regulatory powers over interstate commerce to a lesser degree than by absolute prohibition of such commerce in the subjects regulated.

Particularly pertinent is the **Wilson Act** (26 Stat., 313), providing that intoxicating liquors transported from one state to another and remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state be subject to the operation and effect of the laws of the same, to the same extent and in the same manner as though such liquors had been produced therein, whether introduced in the original package or otherwise. This statute was sustained in **Wilkerson v. Rahrer (In re Rahrer)**, 140 U. S., 545, 35 L. Ed., 572, in which it was said by Mr. Chief Justice Fuller on behalf of the court:

> "And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government." P. 554 (574).

It was stated by the court that the adoption of the Constitution placed in the Congress the power to prevent the enactment by the states of commercial regulations discriminatory in character or detrimental to the common interests.

> "But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question." P. 561 (576).
>
> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress." P. 565 (578).

Further example may be found in the **Lacey Act** (31 Stat., 187), making unlawful the transportation to any other state of the dead bodies of any game animals or birds which have been killed or shipped in violation of the laws of the state in which they were killed or shipped. The same act provides that the dead bodies of game animals or birds transported from one state into another for use, consumption or sale therein, shall be subject to the operation and effect of the laws of the state of destination, to the same extent and in the same manner as if such animals or birds had been produced in such state.

These statutes, as was pointed out by the court, related to wholesome articles of food, and have been sustained in many cases.

> **New York, ex rel. Silz, v. Hesterberg,** 211 U. S., 31, 53 L. Ed., 75;
> **LaCoste v. Department of Conservation of State of Louisiana,** 263 U. S., 545, 68 L. Ed., 437;
> **Rupert v. United States,** 181 Fed., 87;
> **State v. Heger,** 194 Mo., 707, 83 S. W., 252.

In **New York, ex rel. Silz, v. Hesterberg, supra,** the relator was arrested for having in his possession the dead body of a golden plover, and the dead body of a grouse which had been lawfully taken in England and Russia respectively, and imported into the United States in accordance with the provisions of the tariff laws thereof, during the open season for such birds in New York state. The New York statute prohibited possession of plover and grouse during specified seasons of the year Such imported birds were varieties different in form, size, color and markings, from birds known as plover and grouse in the state of New York. They could be distinguished even when cooked and ready for the table. The birds were sound, wholesome and valuable articles of food and recognized as articles of commerce in different countries of Europe and the United States.

Mr. Justice Day in delivering the opinion of the court sustaining the statute stated that it was the purpose of the Legislature,

> "by laws alike applicable to foreign and domestic game, to protect the people of the state in the right to use and enjoy the game of the state.

> "The New York Court of Appeals further held that the so-called Lacey Act (31 Stat., at L. 187, Chap. 553, U. C. Comp. Stat., 1901, P. 290), relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson Act was sustained by this court. In re Rahrer (Wilkerson v. Rahrer), 140 U. S., 545, 35 L. Ed., 572, 11 Sup. Ct. Rep., 865.
>
> "In the aspect in which the game law of New York is now before this court we think it was a valid exertion of the police power, independent of any authorization thereof by the Lacey Act, and we shall therefore not stop to examine the provisions of that act." P. 43-44 (81).

And the Supreme Court of Missouri, in **State v. Heger, supra**, held a statute prescribing a fine for the selling of game, whether taken within or without the state, to be not in violation of the commerce clause of the Constitution of the United States in view of the **Lacey Act**. In that case the court said:

> "But even if it be conceded that there is a distinction between a shipment of game taken in this state to a point outside of this state, and a shipment of game taken in another state to a point in this state, and that in the latter case the consignor acquired a property interest in the game thus shipped, making it an article of interstate commerce, to regulate which the Legislature has no power, it will not be denied that the right to so regulate rests in Congress. * * * So that whatever doubt may have existed as to which tribunal, the Congress of the United States or the Legislature of this state, has the power and authority to regulate or prohibit the keeping and selling of game taken in another

> state and shipped to a point in this state is put at rest by Section 5'' (of the Lacy Act, subjecting the dead bodies of game animals and game birds to the operation of the laws of the state upon their arrival therein.) (P. 714.)

The **Webb-Kenyon Act** (37 Stat., 699), which prohibits the transportation of intoxicating liquors into states where the same were "intended to be received, possessed, sold, or in any manner used either in the original packag or otherwise, in violation of any law of such state," was sustained in the case of **James Clark Distilling Company v. Western Maryland Ry. Co.**, 242 U. S., 311, 61 L. Ed., 332. The court in its opinion was careful to point out to those who expressed the fear that to sustain the act might lay the basis for subjecting interstate commerce in all articles to state control, that such regulation might not be made except as to those articles over which the states, within the scope of their jurisdiction, possessed an undisputed right of control. Said the court:

> "Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. **The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guar-**

> **anties of the Constitution but for the enlarged right possessed by government to regulate liquor,** has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." P. 332 (341). (Boldface ours.)

We submit that this James Clark Distilling Company case directly supports the constitutionality of the Hawes-Cooper Act here under attack. Petitioner's attempt to distinguish this case from the case at bar is feeble. Can it be said that intoxicating liquor, the sale of which was then regulated or prohibited by most of the states, was an article less "exceptional" in its nature, than is prison made goods, the sale of which on the open market is now prohibited or otherwise regulated by most of the states? A mere statement of the question impels the answer. Surely liquor, the sale of which was then thought to be so injurious to the health and welfare of the states, is no more exceptional than the unrestricted sale on the open market of prison made goods which thirty states have declared is injurious and disastrous to the economic health and welfare of their citizens. Fine distinctions cannot and may not be drawn to the effect that things which injure the physical or moral welfare are more exceptional in their nature than things which injure the economic welfare. Each must be on an equal footing—each is vital to the general welfare.

We might also cite the fact that Congress has prohibited the interstate transportation of diseased cattle and persons, obscene literature and many other articles of a similar nature.

But in each of these instances, whether the regulation of interstate commerce in specific articles took the form of prohibition of transportation, or whether the regulation merely prescribed the regular means for accomplishing the introduction and incorporation of the articles mentioned into and with the mass of property in the state, or whether the regulation simply prohibited transportation into states where the articles mentioned were to be used in violation of state laws, or prohibited transportation into other states of articles taken in violation of the laws of the state of origin, the articles regulated, while not necessarily harmful in themselves, were of a sort, or the effect of their use was such, as to give both state and nation, within the respective spheres of their authority, supreme power over them, before the passage by the Congress of the acts complained of in the various cases. **The test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. State v. Clausen,** 65 Wash., 156, 117 Pac., 1101, 37 L. R. A. (N. S.), 466. In other words, such regulation by Congress rested "upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such", that the regulation made in each instance was justified. **Hammer v. Dagenhart,** 247 U. S., 251, 270, 62 L. Ed., 1101, 1105.

It may be reiterated that each of these congressional enactments was in aid of the enforcement of local policies of the states enacted in the exercise of their undisputed right to prohibit, within the limits of their authority, the use of such articles in a manner inimical to the general welfare—material or moral.

VII.

THE HAWES-COOPER ACT DELEGATES NO POWER TO THE STATES TO REGULATE INTERSTATE COMMERCE, AND HAS BEEN SO CONSTRUED.

It is contended by the petitioner that the Hawes-Cooper Act is in effect a prohibition of interstate commerce, similar to that attempted by the **Child Labor Act** (39 Stat., 675) and is therefore invalid; or that it is a delegation to the respective states of the power invested in the Congress to regulate commerce, and is invalid on that ground. This contention is wholly without merit. The act is upon its face a regulation—not a prohibition of commerce, nor a delegation of power.

It is settled by an abundance of authority that in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction which had been previously given to such language by the courts and to have used it according to that interpretation which is known and established.

> **Hecht v. Malley**, 265 U. S., 144, 68 L. Ed., 949;
> **Sessions v. Romadka**, 145 U. S., 29, 43, 36 L. Ed., 609, 614;
> **Latimer v. United States**, 223 U. S., 501, 604, 56 L. Ed., 526, 527.

The language of the **Hawes-Cooper Act** is identical, except as to the commodity involved, with the **Wilson Act**, the **Lacey Act**, and the **Oleomargarine Act**.

This language has been construed so frequently that its meaning is no longer open to question. It was said in the **Rahrer case, supra**, that:

> "It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state." P. 560 (576).

But that in adopting the **Wilson Act** the **Congress**,

> "has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property." P. 561 (576).

* * * * * * * * * *

> "No reason is perceived why, if Congress chooses to provide **that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.**" P. 562 (577). Boldface ours.)

* * * * * * * * * *

> "Congress did not use terms of permission to the state to act, **but simply removed an impediment to the enforcement of the state laws** in respect to imported packages in their original condition, **created by the absence of a specific utterance on its part.** It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." P. 564 (577). (Boldface ours.)

In the **Clark Distilling Company case, supra,** the court again construed the language of the **Wilson Act** to be a proper regulation of commerce. It was said:

> "As we have already pointed out, the very **regulation made by Congress in enacting the Wilson Law** to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. P. 330, (340) (Boldface ours).

* * * * * * * * * * *

> "As the power to **regulate which was manifested in the Wilson Act,** and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,—a result which, as we have previously said, would reverse **Leisy v. Hardin** and overthrow the many adjudications of this court sustaining the Wilson Act. P. 330 (340) (Boldface ours).

* * * * * * * * * * *

> "Or, in other words, stating the necessary result

> of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both state and nation, in their respective spheres of authority, possessed the supremest authority before the action of Congress which is complained of; and hence the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaporated." P. 331, (340-341).

* * * * * * * * * *

The language here has been before the Supreme Court in many cases since that time, and the construction made in the **Rahrer case** has been repeatedly affirmed, and had therefore become firmly established at the time of the enactment of the act in question here.

See

- **Rhodes v. Iowa**, 170 U. S., 412, 42 L. Ed., 1088;
- **American Express Company v. Iowa**, 196 U. S., 133; 49 L. Ed., 417;
- **Pabst Brewing Co. v. Crenshaw**, 198 U. S., 17, 49 L. Ed., 925;
- **Rosenberger v. Pacific Express Co.**, 241 U. S., 48, 60 L. Ed., 880;
- **Delamater v. South Dakota**, 205 U. S., 93, 51 L. Ed., 724.

VIII.

THE CHILD LABOR CASE SUPPORTS THE CONSTITUTIONALITY OF THE HAWES-COOPER ACT.

The petitioner herein relies upon the decision in the **Child Labor** case, **Hammer v. Dagenhart, supra,** as authority for the assertion that the regulation provided in this act may not be made. The statute under attack in that case had no similarity in meaning or effect to the one under consideration here, and in the light of the intention of Congress to adopt the construction which had been made of the language used in the **Hawes-Cooper Act,** it cannot be contended that the decision in the **Child Labor case** is controlling.

It must be remembered that the **Child Labor** statute attempted to prohibit the transportation in interstate commerce of all goods which had been produced by child labor. The prohibition was not limited to those goods produced by a state with the enforced labor of children or to those goods destined to states whose laws prohibited their use or sale. It applied without limit to all goods produced in free factories with free labor, in violation of the terms of the act. The difference between child labor and prison labor is obvious. As was said in **Ex Parte Wilson,** 114 U. S., 417, 429, 29 L. Ed., 89, 93:

> "Imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words, '**involuntary servitude** for crime', spoken of in the provision

> of the Ordinance of 1787, and the Thirteenth Amendment of the Constitution, by which **all other slavery** was abolished." (Boldface ours.)

An important distinction between child labor and prison labor rests upon the contention that free child labor at least has the right to bargain for satisfactory wages. On the other hand, prisoners have no choice in the matter. We submit that this court in the **Child Labor case** reaffirmed the doctrines upon which regulations by the Congress similar to that here under attack had previously been sustained, and those principles absolutely support this legislation.

It was urged by the government in that case that adjudicated cases established the doctrine that the power given to Congress to regulate commerce incidently included the authority to prohibit the movement in interstate commerce of ordinary commodities. But the court said that the decisions rested "upon the **character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them** is such that the authority to prohibit is as to them but the exertion of the power to regulate." P. 270, (1105). (Boldface ours.)

And further:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." P. 273, 274, (1106).

• • • • • • • • • •

> "The maintenance of the authority of the stat
> over matters purely local is as essential to the pre
> ervation of our institutions as is the conservati
> of the supremacy of the federal power in all matte
> entrusted to the nation by the federal Constitution
> P. 275, (1107).

In other words, the Congress had there passed a la
which attempted to fix a standard for the manufactu
of commodities. In the case at bar we are concerned wi
a rule for the introduction and incorporation of priso
made articles into and with the mass of the property
a state, thereby removing an impediment to the enforc
ment of state laws in respect to original packages of su
goods, asserted to exist by the absence of a specific utte
ance upon the part of Congress. Here Congress is mere
saying that its control over interstate commerce shall
exercised in consideration of the "nature and charact
of our dual system of government, state and nation, a
instead of absolutely prohibiting has so conformed
regulation as to produce cooperation between the loc
and national forces of government, to the end of pr
serving the rights of all."

The law here is not an invasion of state sovereign
as was the Child Labor Law, but on the contrary is
support of state rights and state sovereignty. This ca
is therefore more than one to be distinguished from t
Child Labor case,—it is an opposite case, and the **Chi**
Labor case supports the ~~court~~ CONSTITUTIONALITY of the **Hawes-Cooper A**

Whether the enactment is wise or unwise, whether
is based on sound economic theory, whether it is the b
means to achieve the desired result, whether, in sho

the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. **Chicago, B. & Q. R. Co. v. McGuire**, 219 U. S., 549, 569, 55 L. Ed., 328, 339; **Chicago, R. I. & P. R. Co. v. Perry**, 259 U. S., 548, 556, 66 L. Ed., 1056, 1061; **German Alliance Ins. Co. v. Lewis**, 233 U. S., 389, 414, 58 L. Ed., 1011, 1022. It is sufficient to say that Congress in its judgment has recognized what thirty states have sought to control, the traffic in prison made goods; a traffic and an evil recognized even by the Constitution of Ohio (Article II, Sec. 41, Appendix).

IX.

ORIGIN OF COMMODITIES DOES NOT EXEMPT INTERSTATE COMMERCE IN THEM FROM REGULATION BY CONGRESS.

The contention of the petition that the origin or ownership of the articles involved in this controversy exempts interstate commerce in them from regulation by the Congress has no basis either in reason or in authority. The whole argument of the petitioner is to the effect that while Congress has the power to regulate commerce in articles produced by free labor, by manufacturers who pay taxes, it has no authority to place any restraint upon the business of dealing in the products of human misfortune; that the only authority Congress has with reference to these commodities is to remain silent, since if Congress acts at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

This argument is completely refuted by the language of the court in the **Rahrer case**:

> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.
>
> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." P. 562 (577).

The Congress is not to be denied the power to protect navigation on all waterways of the United States against unreasonable obstructions, even though such obstructions were created under sanction of a state. And whether the obstruction is unreasonable is to be determined by Congress. **Union Bridge Co. v. United States**, 204 U. S., 364, 401, 51 L. Ed., 523, 539. It may prevent a conspiracy to obstruct interstate transportation of hats from a state to the various places of their destination, "although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and, some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of federal authority."

Loewe v. Lawlor, 208 U. S., 274, 301, 52 L. Ed., 488, 502.

The argument that the control of the states over manufacture prevented Congress from exercising its power to regulate commerce was urged in the case of **Standard Oil Company v. United States**, 221 U. S., 1, 68, 69, 55 L. Ed., 619, 648. In referring to this contention it was stated by the court:

> "So far as the objections of the appellants are concerned, they are all embraced under two headings:
>
> a. That the act, even if the averments of the bill be true, cannot be constitutionally applied because to do so would extend the power of Congress to subjects **dehors** the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in **United States v. E. C. Knight Co.**, 156 U. S., 1, 39 L. Ed., 325, 15 Sup. Ct. Rep., 249. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice."

And the Congress may prohibit the payment, by advertising, for interstate travel although payment in this manner is expressly authorized by state law.

> **Chicago, I. and L. Ry. Co. v. United States**, 219 U. S., 486, 496, 55 L. Ed., 305, 309.

While the Congress may not make it unlawful to misbrand articles of food, it is a legitimate exertion of the power of Congress to regulate interstate commerce to make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded.

Weeks v. United States, 245 U. S., 618, 622, 62 L. Ed., 513, 515.

Why, then, may not Congress adopt such regulations of interstate commerce in prison-made goods as will permit the effective operation of the policies of the several states enacted in the promotion of the public welfare of the people thereof, by preventing the destruction of the industries, and the reduction of the labor of the state to a condition of unemployment or servility? We submit it may.

X.

UNDER ITS POLICE POWER A STATE MAY PROHIBIT THE SALE ON THE OPEN MARKET OF PRISON-MADE GOODS.

We assume that it will not be disputed by the petitioner that the general scope of the police power extends to placing all necessary restraints and burdens on persons and property in order to preserve and promote what the prevailing public opinion of the state deems to be the general welfare of the people thereof.

A state may legislate to suppress an evil, "increase the industries of the state * * * and add to its wealth and prosperity".

> **Barbier v. Connolly,** 113 U. S., 27, 31, 28 L. Ed., 924;
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> **Bowman v. Chicago and Northwestern Ry. Co., supra;**
>
> **Central Lumber Co. v. South Dakota,** 226 U. S., 157, 57 L. Ed., 164;
>
> **Quong Wing v. Kirkendall,** 223 U. S., 59, 56 L. Ed., 350;
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> **Booth v. Illinois,** 184 U. S., 425, 46 L. Ed., 623;
>
> **Chicago B. & Q. R. Co. v. Illinois,** 200 U. S., 561, 50 L. Ed., 596;
>
> **Lake Shore and M. S. R. Co. v. Ohio,** 173 U. S., 285, 43 L. Ed., 702;
>
> **Armour & Co. v. North Dakota,** 240 U. S., 510, 60 L. Ed., 771;
>
> **Nebbia v. New York, supra.**

The police power of a state is that inherent power of the sovereign to govern, and includes everything essential to public good. The only limitation upon the power is that it may not be exerted arbitrarily or with unjust discrimination.

In **Barbier v. Connolly, supra,** the court said that the Fourteenth Amendment, broad and comprehensive as it is, was not designed to interfere with the power of the state,

> "to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." P. 31 (925).
>
> * * * * * * * * * *
>
> "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, **but to pro-**

> **mote**, with as little individual inconvenience as possible, **the general good.**" PP. 31 and 32 (925).

In the concurring opinion of Mr. Justice Field in the **Bowman case, supra,** it was pointed out that:

> "The state possesses the power to prescribe all such regulations with respect to the possession, use and sale of property within its limits as may be necessary to protect the health, lives, and morals of its people; **and that power may be applied to all kinds of property, even that which in its nature is harmless.**" P. 501 (712). (Boldface ours.)

And Mr. Justice Holmes, speaking for this court in **Central Lumber Co. v. South Dakota**, supra, said:

> "If the Legislature shares the now **prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its laws against what it deems the evil as it actually exists** without covering the whole field of possible abuses, **and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.**" P. 160 (169). (Boldface ours.)

That case sustained the right of the state to prevent price discrimination between sections of the state when such discrimination was for the purpose of preventing competition.

In **Noble State Bank v. Haskell,** 219 U. S., 104, 55 L. Ed., 112, it was said that the police power of a state may be said in a general way to extend to all great public needs.

> **"It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or**

> **strong and preponderant opinion to be greatly and immediately necessary to the public welfare.** Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions to successful commerce." P. 111 (116). (Boldface ours.)

Mr. Justice Harlan, speaking for the court in the **Booth case, supra,** said:

> "Is it true that the Legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious." P. 429 (626).

In the **Armour case, supra,** the court stated at page 513 (774):

> "We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the Legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, **there was not necessarily meant some definite injury, but obstacles to a greater public welfare.** Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws." (Boldface ours.)

And as was stated by Mr. Justice McKenna in **Rast v. Van Deman & Lewis Co.,** 240 U. S., 342, 357, 60 L. Ed., 679, 687:

> "It is the duty and function of the Legislature to discern and correct evils, and by evils we do not

> mean some definite injury, **but obstacles to a greater public welfare. Eubank v. Richmond,** 226 U. S., 137, 142, 57 L. Ed., 156, 158; **Sligh v. Kirkwood,** 237 U. S., 52, 59, 59 L. Ed., 835, 837." (Boldface ours.)

It was stated by the Supreme Court of Washington in the case of **Davis-Smith Co. v. Clausen,** 65 Wash., 156, 117 Pac., 1101, that under the police power a state might,

> "regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employers engaged in it, the people surrounding it, **or to any considerable number of people at large,** no matter from whatsoever cause the menace may arise."

It has been said by the Supreme Court of Ohio, in **Phillips v. State,** 77 Ohio St., 214, 82 N. E., 1064, that:

> "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and **best interests of the commonwealth** may be done under the police power; and this implies that **private rights exist subject to the public welfare.**" (Boldface ours.)

So in **Boston Beer Co. v. Massachusetts,** 97 U. S., 25, 24 L. Ed., 989, it was said:

> "If the public safety or the public morals require the discontinuance of **any** manufacture or **traffic,** the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." P. 32 (992).

In **Mugler v. Kansas,** 123 U. S., 623, 31 L. Ed., 205, Mr. Justice Harlan stated:

> "No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares

> to be prejudicial to the general welfare." P. 663, (211).

Therefore, when a business becomes prejudicial to the public welfare, or becomes a menace to any considerable number of people at large it may be prohobited. In **Murphy v. California**, 225 U. S., 623, 56 L. Ed., 1229, Mr. Justice Lamar stated:

> "The Fourteenth Amendment * * * does not prevent legislation intended to regulate useful occupations which, because of their nature * * * may prove injurious or offensive to the public." P. 628 (1232).

And the "regulation or prohibition need not be postponed until the evil has become flagrant". P. 629 (1232).

The business of selling stock on margin or for future delivery may be prohibited. **Otis v. Parker,** 187 U. S., 606, 47 L. Ed., 323. In that case it was said:

> "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" P. 609, 327.

And in the **Hannibal & St. Joseph R. Co. v. Husen,** 95 U. S., 465, 24 L. Ed., 527, it was stated that:

> "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils." P. 471 (530).

And in the very recent **Nebbia case, supra,** Mr. Justice Roberts, for the court, reaffirmed these principles. He said:

> "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government." P. 524 (949).
>
> "The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community." P. 525 (950).
>
> * * * * * * * * * *
>
> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned." P. 527-528 (951-952).
>
> * * * * * * * * * *
>
> "So far as the requirement of due process is concerned, * * *. a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared, by the Legislature to override it." P. 537 (957).

And further:

> "The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people." P. 539 (958).

Further examples are unnecessary. In general it may be stated that the possession and enjoyment of all rights, even to the right of traffic in prison-made goods are held subject to such regulations as are necessary for the public good.

It must be recognized, however, that the state has even a broader control over prison-made goods than it might have over the products of private industry. It is a control which emanates from the exercise of a governmental function.

Unquestionably the authorities agree that the erection of prisons for the detention of those convicted of crime is a governmental function in which the public generally is concerned. They are operated by the state in the exercise of its sovereign powers in the performance of its duty in the administration of its criminal laws enacted for the preservation of order and the security of society, 21 R. C. L., 1168.

District of Columbia v. Totten (App. D. C.) 5 Fed. (2d), 374, 376.

And this power, resting as it does in the Legislature "is to be exercised, like all other powers of government as a trust for the benefit of the people, **and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good."** **Geer v. Connecticut,** 161 U. S., 519, 529, 40 L. Ed., 793, 797. (Boldface ours.)

And this duty can neither be limited, abdicated nor bargained away by contract or otherwise.

Atlantic Coast Line Ry. Co. v. Goldsboro, 232 U. S., 548, 58 L. Ed., 721;
Stone v. Mississippi, 101 U. S., 814, 25 L. Ed., 1079.

It is also well recognized that the labor of the prisoner and the products thereof during the period of his incarceration belong to the people of the state in their sovereign capacity and may be disposed of only in such a way as the Legislature in its discretion may determine.

State v. McCauley, 15 Cal., 429, L. R. A., 1916 D., 661;
Hancock v. Ewing, 55 Mo., 101;
State ex rel Greaves v. Henry, 87 Miss., 125, 5 L. R. A. (N. S.), 340, 345;
Jones Hollow Ware Co. v. Crane, 134 Md., 106 Atlantic 274, 3 A. L. R. 1658, 1670;
Georgia Penitentiary Company v. Helms, 65 Ga., 499;
Shenandoah Lime Co. v. Governor, 115 V., 865.

The fact that Alabama has determined that the public welfare is better served by permitting the unrestricted sale of prison goods in all its markets, does not permit it to make that determination for Ohio. It is for Ohio to decide whether the public welfare of the state requires that no prison-made goods may be sold in the general internal markets of the state.

Geer v. Connecticut, Supra, p. 530 (797);
In re Rahrer, supra;
Ex Parte Maier, 103 Cal., 476, 37 Pac., 402;
Magner v. People, 97 Ill., 320;
Johnson et al v. Gentry, et al, 30 P. (2d), 400;
Union Fisherman's Co. v. Shoemaker, 98 Or., 659, 193, p. 476.

In **Ex Parte Maier, supra,** in upholding a statute prohibiting the sale of deer meat, and applying to deer imported as well as those taken within the state it was said:

> "The wild game within a state belongs to the people of the state in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; **and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.**" (Boldface ours.)

And in **Magner v. People, supra**, the Supreme Court of Illinois stated:

> "It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the **duty** of the Legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. **But in any view, the question of individual enjoyment is one of public policy and not of private right.**" (Boldface ours.)

In **Johnson et al v. Gentry, et al, supra**, the California Supreme Court sustained a statute of that state which set up during the closed season for salmon fishing within the state, a barrier to the transportation through the state of salmon caught outside the jurisdiction of the state.

In **Union Fishermen's Co. v. Shoemaker, supra**, an Oregon statute enacted to make effective the declared policy of the state with reference to taking fish from its own waters, and which prohibited the possession of salmon, which were in this case caught on the high seas, was sustained. The court said:

> "Of course the state of Oregon has no jurisdiction over the waters of the Pacific ocean beyond the three mile limit; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three mile limit unlawful. The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do so is settled beyond controversy."

This doctrine has been so universally established that it is unnecessary to do more than cite a few of the cases supporting it.

Wells v. Penton, 99 Fla., 1069, 128 So., 500;
People v. Booth Fisheries Co., 253 Ill., 423, 97 N. E., 837;
Stevens v. State, 89 Md., 669, 43 At., 929;
Roth v. State, 51 Ohio, 209, 37 N. E., 259.

Each state, therefore, has the inherent right to determine its public policy with respect to the business of selling prison-made goods, and it may adopt such regulations regarding the same as is determined to be in the public interest.

But it is contended by the petitioner that the powers of the state and nation may not be exercised to eliminate evils which are economic in character. This contention finds no support in the decisions. The courts have specifically held otherwise.

In the **Nebbia case, supra,** it was declared by the court to be within the police power of the state to correct economic ills by appropriate legislation. It upheld the right of the state to so control the milk industry as to prevent serious economic losses to the people of the state and to prevent the demoralization of prices for the commodity, and the curtailment or destruction of the industry.

We have heretofore shown that certain prison-made commodities have already driven out of business private manufacturers of similar articles, and that increased sale in other prison-made commodities are threatening destruction of private manufacture of those commodities.

The Congress has in other instances acted directly, within the scope of its authority, to protect the people of the United States from evils much less destructive in character than these.

By reason of the decision in the case of **United States ex rel Attorney General v. Delaware and Hudson Company,** 213 U. S., 366, 53 L. Ed., 836, sustaining the commodities clause of the **Hepburn Act** (34 Stat., 584), interstate rail carriers are prohibited from transporting in interstate commerce any commodity (except timber and the products thereof, and such other articles as may be necessary and intended for use by it in the conduct of its business) manufactured or mined by it or under its authority, and in which it has an interest, direct or indirect. This is true although the state may have encouraged the combination of the railroad and mining or manufacturing business, as had Pennsylvania. In that case the court said:

> "The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce,

> That it was, we think is apparent, and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New Haven case to which we have previously referred." P. 415 (852).

The reasons for the decision in the **Delaware & Hudson** case are identical with those upon which the decision in the case of **New York, N. H. & H. R. Co. v. Interstate Commerce Commission,** 200 U. S., 361, 50 L. Ed., 515, rested. The question presented there was whether an interstate carrier might agree to sell and transport a commodity when the stipulated price does not pay the cost of purchase, the cost of delivery and the published freight rates. It involved the validity of that part of the **Interstate Commerce Act,** requiring adherence to published tariffs and prohibiting secret departures therefrom. The court pointed out that the effect which would inevitably result in permitting a public carrier to deal in commodities under circumstances where it could discriminate against other dealers in the same commodities would be an ultimate acquisition of a monopoly in the business of dealing in such products. The court stated:

> "Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monop-

> olization in the hands of such persons of all the products as to which the carrier chose to deal. * * * To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and **eliminate the cost of transportation to such market**, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer." P. 392 (521-522).

The analogy to be drawn is clear.

Likewise, the Congress has acted directly to protect the people of the United States against the effect of the importation of cheap labor. As stated by Mr. Justice Hughes, in **Bailey v. Alabama**, 219 U. S., 219, 245, 55 L. Ed., 191, 202:

> "There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

In the case of **Church of the Holy Trinity v. United States**, 143 U. S., 457, 463, 36 L. Ed., 226, 229, the court sustained the right of Congress to legislate for the purpose of maintaining the labor standards in this country, by making unlawful the importation of laborers under contract to perform labor. The court in its decision quoted with approval a statement by Mr. Justice Brown in a previous case, as to the necessity for the act, as follows:

> "The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when as district judge, he decided the case of **United States v. Craig**, 28 Fed. Rep., 795, 798: 'The motives

> and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. * * *''

This statement was reaffirmed in the case of **Sharrenberg v. Dollar Steamship Co.**, 245 U. S., 122, 126, 62 L. Ed., 189, 192, in which Mr. Justice Clarke, speaking for the court said:

> ''The purpose of this alien labor legislation was declared by this court almost thirty years ago, in **Holy Trinity Church v. United States,** 143 U. S., 457, 36 L. Ed., 226, 12 Sup. Ct. Rep., 511, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant.''

The Congress has been mindful of the effect of the sale of prison-made goods, and has taken other steps other than the one attacked here to remedy the evils.

The Congress for many years has prohibited the importation into the United States of goods manufactured in whole or in part by convict labor, and has provided that no goods manufactured in federal prisons may be sold in the markets of the United States.

In 1904, there was passed an act (33 Stat., 435) which provides that the post office department shall not purchase materials or supplies manufactured by convict labor. In 1905 President Theodore Roosevelt issued an executive order (Ex. Order No. 325-a) prohibiting any of the officers and agents of the United States from contracting for supplies manufactured by convict labor.

The Reconstruction Finance Corporation Act, as amended (Title 15 U. S. C. A., Sec. 605 (b), para. 6), provides that all loans and contracts made by the Reconstruction Finance Corporation for the construction of public works shall be subject to the condition, among others, **that no convict labor shall be** directly employed on any such project.

The Appropriations Act approved June 30, 1932 (47 Stat., 418), prohibited the purchase of any materials or services to be furnished or performed by convict labor.

XI.

THE PROVISIONS OF THE OHIO STATUTES ARE REASONABLE REGULATIONS DESIGNED TO PROMOTE THE PUBLIC WELFARE.

Sections 2228-1 and 2228-2, General Code of Ohio, were enacted by the Legislature and approved March 23, 1933. Let us see what situation confronted the Legislature at that time. It is a matter of common knowledge that in the year 1932, the period midway between the approval of the **Hawes-Cooper Act** and its effective date that goods in the value of approximately $28,000,000 were manufactured in state prisons and sold in the markets of the country, and that 65.7 per cent (as against 58 per cent in 1923) of such goods were sold outside the state where produced, thereby imposing upon certain unwilling states most of the burden of the maintenance of the prisons for the administration of the criminal laws of those states which still used "unskilled hands to manufacture and place on the market inferior goods."

It is also commonly known that in all the prisons of the country 82,000 prisoners were engaged in productive employment in 1932, as against 51,000 prisoners so engaged in 1923; that more than 19,000 prisoners were engaged in the production of clothing alone in 1932, as against 10,000 in 1923.

During this same period, 1923 to 1932, the number of free establishments in Ohio manufacturing textile products decreased from 679 to 567, while the number of employees in such manufacture decreased from 47,879 in 1923 to 34,088 in 1932. The average wage during this same period in the men's clothing division of the textile manufacturing industry in the state of Ohio decreased from $1,054 in 1923 to $667 in 1932. Similar decreases are to be noted in other divisions of the industry. (Bulletin No. 613, Bureau of Labor Statistics, United States Department of Labor.)

More than 19,000,000 work shirts (as against 13,800,000 in 1923) were manufactured in prisons and sold in the open market in 1932 in competition with approximately 62,000,000 work shirts made by free labor; 7,000,000 pairs of pants were produced in prisons and sold upon the open market in competition with 27,000,000 pairs of work pants made in private factories for the same year and in addition some 640,000 pairs of overalls were produced in prison factories during the same period. In 1923, the prisons produced only 3,000,000 pairs of pants. There were sold upon the open market in 1932 more than 3,000,000 brooms in competition with private broom factories, in which the blind are very widely employed. As against 61,000,000 pounds of twine and rope produced by prisons in 1923, more than 63,000,000 pounds of binder twine alone were so produced in 1932, and sold in competition with 158,000,000 pounds of such twine produced by private industry with free labor. This latter figure is to be compared with more than 240,000,000 pounds sold by free industry in 1923. In addition to the binder twine more than 3,500,000 pounds of rope made by prisons went into competition with rope produced by private industry in 1932.

In 1932 approximately 4,000,000 suits of underwear were made in prisons for sale on the open market, as against approximately 15,000 in 1923. Prisons produced for sale in the open market in 1932 approximately 1,500,000 children's play suits as against 919,000 in 1923; in 1932 there were produced by the prisons for sale approximately 2,000,000 dresses, while available reports do not show that any were produced in 1923; that in 1932 approximately 800,000 wood chairs were produced in prisons for sale in the general markets as against 400,000 in 1923. Many other items might be mentioned but those are sufficient to show the trend of prison production which concerned the state of Ohio when it came to consider the problem in 1933. (See United States Department of Labor Bulletin No. 595, Prison Labor in the United States, 1932.)

These facts, could but lead to the conclusion that continued unrestricted commerce in prison-made commodities was destructive of the general welfare.

Indeed, the inevitable result of the situation confronting the state would be to enable the prisons and their agents or distributors to so concentrate in their own hands the production and sale in the general markets of particular commodities, thereby driving out of business the legitimate manufacturer of similar articles. To illustrate: If a dealer in prison-made goods, produced in subsidized factories, by forced labor, without certain normal elements of production costs, such as decent wages, rent, capital investment, taxes, overhead items, customary selling costs and factory supervision, has free access to the same markets as do dealers in goods made in private factories, no other person can possibly market a competitive commodity and remain in business.

For it cannot be challenged that certain prisons were rapidly approaching the position of sole producers of certain commodities previously produced by independent manufacturers. The facts were not mere accidental developments but were clearly the result of the freedom from restriction which prison-made commodities enjoyed.

The effect of such commerce was to break the labor market, to reduce free laborers, engaged in competitive occupations, almost to the level of the convicts, and to drive out of business those manufacturers who could not successfully meet prison prices in the marts of trade.

There was grave danger that they may, if left uncontrolled and free from the rules of normal trade, dominate the entire business of the country in any commodity, as they have already done with respect to some commodities. If they can threaten the general welfare and prosperity of a state by the destruction of private industry with regard to twine, shirts, brooms, stoves, hollow-ware, etc., what is to prevent their invasion of any commercial field?

The prison knows no limitation upon the quantity of the commodities to be produced; the only limitation arises out of the number of prisoners available for production. There is manifestly great detriment to the public interest lurking in an unrestricted, rampant, irresponsible and uncontrolled system of prison sales.

The Constitution and the statutes of Ohio show a long continued recognition by the people and the Legislature of the state that a clear distinction exists between goods made by convicts and those made by free labor in free institutions. Prison labor, as this court has said, is a species of slave labor. **Ex Parte Wilson, supra.** The principle, therefore, is that convict-made goods differ from similar articles manufactured by free labor, not merely that they have a different origin, but they differ fundamentally in that they are virtually a product of slave labor.

While the state of Alabama produced only 43,046 articles of clothing for sale in the general markets of the country in 1923, the petitioner is now asserting the right to nullify the laws of Ohio by sending into that state and selling upon the open market prison-made goods in unlimited quantities. He claims freedom from control in the sale in Ohio, despite the will of that state as expressed by its Legislature, of the more than 2,000,000 shirts, and the 2,750,000 suits of underwear, in addition to almost 100,000 miscellaneous articles of clothing, or in the sale in Massachusetts, Pennsylvania or New York against their will of the 4,000,000 pounds of cotton yard goods, **produced in 1932 by forced labor, at a labor cost of 15 cents per week for ten hours of labor per day.** In 1932 goods in the value of $3,000,000 were produced by the Alabama state prison system. Of this amount, goods valued at $2,691,916 were sold outside the state thereby compelling, by use of interstate commerce, other states, many of them unwilling to do so, to assume almost the entire cost for the maintenance and operation of Alabama prisons. (See Prison Labor in the United States, 1932, Bulletin of Bureau of Labor Statistics, No. 595.)

It is essential to note that these prison products were made with the cotton raised by the prison of Alabama, spun by the prison of Alabama, and woven into cloth by the prison of Alabama.

No further proof than this is required to show the destructive effect of unrestricted commerce in such articles. And while Ohio may not directly regulate interstate commerce in prison-made goods, it is not bound to furnish unrestricted markets for them, nor to abstain from the passage of any law with respect thereto, which it may deem necessary to guard the general welfare of its people.

The case of **Baldwin v. Seelig**, 294 U. S., 511, 79 L. Ed., 1032, is urged as authority against the validity of the Ohio statute. The decision in that case rests upon exactly the same principle as the decision in the **Bowman** and **Leisy cases, supra**, rested. The question in the **Baldwin case** was the right of the importer of milk to sell it free of the restraints of state legislation. Congress had made no regulation upon the subject, and of course, it was held that state jurisdiction did not attach until after sale by the importer, by which act it becomes mingled in the common mass of the property of the state. That case has no application to the one under consideration, unless it can be said to overrule the **Nebbia case**. No one would suggest such a construction of the decision.

In the case at bar the Congress has made a regulation of interstate commerce in prison-made goods, which regulation "imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The statute of the state of Ohio is not "a law enacted in the unauthorized exercise of a power exclusively confided to Congress," but is "a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress."

Thirty states with a population of more than 90,000,000 people have found the necessity for similar regulation of the traffic in merchandise manufactured within prison walls. The very nature of the business of selling prison-made goods as shown by matters of judicial knowledge is dangerous to the state because it depresses the wages of free labor, produces unemployment, and destroys either the profits of private industry or threatens the very existence of industry itself. Here was an evil, a mischief, a harm inimical to the welfare of the citizens of these states, and if this is borne in mind, it must be conceded that the exercise of the power of the state to make the regulation involved here is a reasonable exercise of Ohio's police power.

XII.

THE ENFORCEMENT OF THE STATUTES INVOLVED DOES NOT VIOLATE THE TENTH AMENDMENT.

The contention of the petitioner that the Ohio statutes aided by the **Hawes-Cooper Act**, must fail because they contravene the Tenth Amendment, is fully answered by the reasons heretofore given in the cases cited.

The state of Ohio under the powers reserved to it by the Tenth Amendment may legislate according to its conceptions of public welfare, which includes whatever will promote the peace, comfort, convenience and prosperity of its people.

Escanaba Co. v. Chicago, 107 U. S., 678, 27 L. Ed., 442;
Petersen v. Iowa ex rel State Treasurer, 245 U. S., 170, 62 L. Ed., 225;
Lehon v. Atlanta, 242 U. S., 53, 61 L. Ed., 145;
Nebbia v. New York, supra.

The Ohio statute in no respect whatever attempts to extend its regulation into the state of Alabama. That state is still free to employ its convicts in any labor which it may determine is most beneficial to the welfare of the state.

Certainly the contention would not be made by the state of Alabama that its law prohibiting the manufacture and sale of intoxicating liquor, the enforcement of which is aided by the **Wilson Act** was designed to prohibit manufacture and sale of liquor for instance in the state of Kentucky.

The Tenth Amendment does not reserve to Alabama the right to violate the laws of Ohio enacted in the exercise of the powers reserved to it by the same amendment.

The **Hawes-Cooper Act** was enacted under the powers expressly delegated to Congress. It withdraws the cloak of immunity from convict-made goods in the hands of the importer in the state of destination, so as to aid in making effective the public policy of those states which have found traffic in prison-made goods to be detrimental to the public interests.

The **Hawes-Cooper Act** does not attempt to **require** states to exercise their police power to change their prison systems in any particular. It merely **permits** the police power of the states to effectively operate within their limits while the articles prescribed by the exercise of that power are in the hands of the importer.

XIII.

THE OHIO LAW PROHIBITING THE SALE OF PRISON-MADE GOODS ON THE OPEN MARKET IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The proposition that the Fourteenth Amendment does not guarantee to any person the right to engage in unlawful pursuits is so well established that no argument is needed to support it. The business of dealing in prison-made goods is inherently subject to legislative control, and no such vested right in the business exists as will prevent the Legislature from withdrawing the right to deal in such goods from those who previously enjoyed it.

Boston Beer Company v. Massachusetts, supra;
Tracy v. Ginzberg, 205 U. S., 170, 51 L. Ed., 755.

The Legislature of Alabama may at its will change the prison system of the state so as to prohibit the manufacture of commodities for sale in the general markets, and the petitioner could not be heard to complain that such action deprived it of its property without due process of law, for the reason that the business of dealing in such goods is not a matter of private right, but is one of public policy.

Hancock v. Ewing, supra;
State v. McCauley, supra;
Jones Hollow Ware Co. v. Crane, supra.

A business that is lawful today may in the future, because of a changed situation, the growth of population or other causes become a menace to the public welfare, be required to yield to the public good. **Pierce Oil Corp. v. City of Hope**, 248 U. S., 498, 63 L. Ed., 381. And if the petitioner has embarked in a business which the public interest demands shall be prohibited, he must know prohibition will ensue. **Nebbia v. New York, supra.** For the Fourteenth Amendment does not limit nor was it intended to limit the subjects upon which the police power of a state may be lawfully exerted.

Jones v. Brim, 165 U. S., 180, 41 L. Ed., 677.

The Ohio statute here under attack makes no discrimination against convict-made goods coming into it from without the state. The Legislature acted to protect the people from the injurious effects of selling convict-made goods in the open market, by laws applicable alike to such goods produced within the state and those imported from without.

And that was the interpretation placed upon the statute by the state courts. It was said by the Ohio Court of Appeals in this case, **Whitfield v. State of Ohio**, 49 O. App., 530, 535, 536:

> "The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff in error to the effect that Section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other states from competing with convict-made goods in the state of

> Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions.
>
> "As we interpret the laws of Ohio, there can be no sale in the open market of goods made by convicts in the state of Ohio; and that the use of such manufactured convict-made goods in Ohio is limited so as to preclude their sale in the open market. There is therefore, no discrimination against citizens or other states when they are prohibited from selling convict-made goods manufactured in another state in the open market in the state of Ohio."

The case of **Arnold v. Zanders,** 56 Ohio St., 417, 47 N. E., 50, referred to in petitioner's brief held an act of the Ohio legislature of May 19, 1894, which restricted the sale in Ohio of prison-made goods to be violative of the federal Constitution. The decision was grounded solely upon the fact that Congress had not authorized such action. The court said, at page 421:

> "To give a state Legislature power to legislate in such cases, requires an act of Congress to that effect. **Leisy v. Hardin,** 135 U. S., 100; **Welton v. Missouri,** 91 U. S., 275."

This early case is interesting as showing a recognition of the power of Congress to act in such cases, and as showing a recognition 40 years ago by Ohio's Legislature of the evils of the unregulated sale of prison-made goods.

XIV.

CONCLUSION.

The **Hawes-Cooper Act** has been sustained as to constitutionality by the courts of last resort of two states—Ohio, in this case, and Wisconsin, in **Wisconsin v. Whitfield**, 216 Wis., 577, 257 N. E., 601. The Supreme Court of Albany county, New York, in **Greenthal v. Bennett, Attorney General**, on January 5, 1934, also sustained this act. No court has held it invalid.

The concern which the people of the various states have had with respect to the constantly increasing volume of prison-made goods going into the commerce of the country is reflected in the history of the statutes of nearly three-fourths of the states enacted over a period of half a century.

This court throughout its history has consistently upheld the valid exercise of the police power of state and nation in the protection of the welfare of their citizens as evidenced by its decisions in upholding restrictive measures regulating interstate commerce in game birds, cigarettes, intoxicating liquor, lottery tickets, certain motion picture films, misbranded food stuffs, stolen automobiles, trafficking in women, etc. In no single instance, where the nation and state have acted concertedly, within their powers as in the case at bar, to suppress an acknowledged evil affecting the public welfare, has this court declared such action to be violative of any constitutional provision, federal or state, but has on the contrary zealously upheld and guarded the exercise of such powers.

This court in maintaining our dual sovereignty has impartially and fearlessly protected the rights and powers of the federal government and at the same time has protected the states against improper encroachment by the federal government.

To set aside the **Hawes-Cooper Act** as violative of any constitutional provision would be to deny to Congress the power to enable those states to correct an evil inimicable to the welfare of their people and to construe the Constitution so as to accomplish an end which its FRAMERS ~~farmers~~ sought to preclude.

To sustain the acts, on the other hand, "affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

The decision of the Supreme Court of Ohio should be sustained.

Respectfully submitted,
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APPENDIX.

45 Stat., 1084:

"All goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any state or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such state or territory be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such state or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

"Sec. 2. This act shall take effect five years after the date of its approval.

"Approved, January 19, 1929."

Section 41 of Article 2 of the Constitution of the state of Ohio:

"Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories of the state; **and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; * * *.**". Boldface **ours.)**

Section 2228, General Code of Ohio:

"The board of managers of the Ohio penitentiary, the board of managers of the Ohio State reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, **or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation.** Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter." (Boldface ours.)

• • • • • • • • • •

Section 2230, General Code of Ohio:

"Nature of work by convicts.—Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile, and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

• • • • • • • • • •

Section 2231, General Code of Ohio:

"Disposition of products.—Such tile, brick and culvert pipe and road building material and such

> products of convict or prison labor as are used in the construction or repair of the public roads shall be furnished the political divisions of this state at cost. The convicts from the penitentiary shall not be intermingled with the convicts from the reformatory in the performance of such labor."

Sections 2228-1 and 2228-2 of the General Code of Ohio:

> "2228-1. After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state.
>
> "2228-2. Whoever violates any of the provisions of the next preceding section shall be fined not less than twenty-five nor more than fifty dollars for the first offense and not less than fifty nor more than two hundred dollars for each subsequent offense."

Section 2228-1, General Code of Ohio, as amended June 4, 1935:

> "After January 19, 1934, no goods, wares or merchandise, manufactured or mined, wholly or in part **in this** or any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

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IN THE

Supreme Court of the United States

No. 377.

October Term, 1935.

ASA H. WHITFIELD,
Petitioner,
vs.
THE STATE OF OHIO.

MEMORANDUM OF NEW YORK STATE, AMICUS CURIAE, AND MOTION FOR LEAVE TO FILE.

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BATAVIA TIMES, LAW PRINTERS,
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The State of Ohio.

Motion for Leave to File.

Now Comes the State of New York, appearing by its Attorney General, John J. Bennett, Jr., and Henry Epstein, Solicitor General, and moves this Honorable Court for permission to file a memorandum, *amicus curiae,* in support of the position of the appellee, the State of Ohio, in the above entitled appeal, before this court.

JOHN J. BENNETT, JR.,
Attorney General,
State of New York,
Albany, N. Y.

Henry Epstein,
Solicitor General.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 377.

October Term, 1935.

Asa H. Whitfield, *Petitioner,* vs. The State of Ohio.	

MEMORANDUM OF NEW YORK STATE, AMICUS CURIAE.

Statement.

The State of New York has upon its statute books, section 69 of the General Business Law, similar in character to Section 2228-1, General Code of Ohio, the statute involved in the instant appeal.

Section 69 of the General Business Law reads as follows:

> "§ 69. *Sale of convict made goods.* No goods, wares, or merchandise, manufactured, produced or mined wholly or in part by convicts, or prisoners, except convicts or prisoners on parole or probation, shall be sold in this state to any person, firm, association or corporation except that nothing in this section shall be construed to forbid the

> sale of such goods produced in the prison institutions of this state to the state, or any political division thereof, or to any public institution owned or managed and controlled by the state, or any political division thereof as provided in section one hundred eighty-four of the correction law.
>
> A violation of the provisions of this section shall constitute a misdemeanor."

Heretofore the State of New York in conjunction with other states, as co-defendants, submitted to this court its brief in an attempted action, covering substantially the issues involved in the instant controversy. The court is respectfully referred to said *"Brief of Defendants on Motion for Leave to File Bill of Complaint"* in matter of State of Alabama, Plaintiff, vs. State of Arizona, *et al.*, Defendants, in the October Term, 1933, in this court. It would be unnecessarily repetitious here again to print said arguments and citations.

Since the presentation to this court in the said case of Alabama vs. Arizona, *et al.*, the Supreme Court of New York, at a Special Term thereof, passed upon the constitutionality of the said § 69 of the General Business Law of New York State and the Hawes-Cooper Act of Congress (49 U. S. C. A. 65, 45 Stat. 1084, Act of Congress, Ch. 79 of 1929). No appeal was taken from the judgment entered on said determination.

In an action in equity, brought by one Harry Greenthal, plaintiff, against John J. Bennett, Jr., as Attorney General of New York, defendant, an injunction was sought to restrain the enforcement of Section 69 of the General Business Law of New York. In said action the validity of the Hawes-Cooper Act and of the New York law was attacked. The court at Special Term dismissed the complaint and rendered judgment for defendant. Judgment was entered Aug. 22, 1934.

Copies of the judgment, findings of fact, conclusions of law, and opinion of the court are hereto annexed for the consideration of this court.

All of which is respectfully submitted, praying that the determination of the Supreme Court of Ohio be affirmed.

JOHN J. BENNETT, JR.,
Attorney General,
State of New York.

Henry Epstein,
Solicitor General.

5

Appendix.

Judgment.

SUPREME COURT—Albany County.

Harry Greenthal,
Plaintiff,
against
John J. Bennett, Jr., as Attorney General of the State of New York,
Defendant.

The above entitled action having regularly come on for trial before Hon. John T. Loughran, Justice of the Supreme Court, on the 28th day of April, 1933, and the plaintiff having adduced evidence in support of the allegations contained in the complaint, and the defendant having moved upon the said evidence for a dismissal of the complaint herein, and the Court after due consideration of all the evidence and after hearing Mortimer Fishel, Esq., counsel for the plaintiff, in support of the petition for an injunction, and John J. Bennett, Jr., of counsel, in opposition thereto, and likewise in support of a motion to dismiss the complaint herein, and the Court having rendered its decision with an opinion, it is now, in accordance therewith, and pursuant to stipulation attached hereto, dated July 31, 1934, and the findings of fact and conclusions of law therein stipulated,

ORDERED AND ADJUDGED that the defendant have judgment dismissing the complaint upon the merits, but without costs.

Dated August 22nd, 1934.

CHRISTOPHER J. HEFFERNAN,
Justice of the Supreme Court.

Enter:

Decision, Findings of Fact and Conclusions of Law.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney
General of the State of New York,
Defendant.

Upon the evidence adduced in the above entitled action and due consideration having been given thereto, the decision of the Court is as follows:

FINDINGS OF FACT.

The Court finds the following material facts pertinent to a determination of the issues herein:

1. That at the time of the commencement of this action the plaintiff was and still is a citizen and resident of the State of New York.

2. That the defendant is the duly elected Attorney General of the State of New York, and acting as such enforces the laws, the observance thereof and compliance therewith and may be called upon to prosecute actions and proceedings in which the State may be interested in connection therewith; that at the time of the commencement of this action the defendant was and still is the duly elected Attorney General of the

State of New York with the foregoing powers and duties.

3. That for some time past, at the time of the commencement of this action, prior thereto and subsequent thereto, the plaintiff was and continued to be engaged in the buying, selling and dealing in goods, wares and merchandise manufactured by convicts and prisoners of states other than the State of New York not on parole or probation; more particularly, in marketing, buying, selling and dealing in work-shirts, overalls and other apparel manufactured by convicts and prisoners of states other than the State of New York not on parole or probation.

4. That the plaintiff at the time of the commencement of this action had contracts with others under which the plaintiff might purchase the aforesaid merchandise manufactured by convicts and prisoners of other states than the State of New York not on parole or probation until the first day of July, 1934, and that the said contracts provided for a renewal thereof.

5. The plaintiff likewise, for the conduct of said business, among other obligations and property had and still has a lease on premises in the State of New York for the conduct of such business, which said lease will not expire until July 1st, 1934 and is subject to renewal by the said plaintiff.

6. That in order for the plaintiff to conduct his said business it becomes necessary for him to purchase the said merchandise manufactured by convicts and prisoners of other states than the State of New York not

on parole or probation in advance, and to enter into contracts for the shipment to him from other states and by him within this State and into other states of such merchandise.

7. The said contracts and lease held by the plaintiff constitute a property right of the plaintiff.

8. Heretofore and on or about the 19th day of January, 1929, there was enacted by the Congress of the United States an Act entitled "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases," and in words as follows:

> "Section 1. All goods, wares and merchandise, manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.
>
> Section 2. This Act shall take effect five years after the date of its approval."

The said Act was approved on and the date of its approval was January 19th, 1929, and the said Act became effective January 19th, 1934.

9. That on or about the 28th day of February, 1933, there was enacted by the Legislature of the State of New York and approved and signed and declared to be law, to take effect January 19th, 1934, by the Governor of the State of New York, a measure in words as follows:

> "The People of the State of New York, represented in Senate and Assembly, do enact as follows:
>
> Section 1. In order to protect free labor from the unjust competition of convict labor and conditions at present warranting the exercise of the sovereign power of the state in enacting this amendment, section sixty-nine of chapter twenty-five of the laws of nineteen hundred and nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," as added by chapter one hundred and thirty-six of the laws of nineteen hundred and thirty, is hereby amended to read as follows:
>
> 69. Sale of convict made goods. No goods, wares, or merchandise, manufactured, produced or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold in this state to any person, firm, association or corporation except that nothing in this section shall be construed to forbid the sale of such goods produced in the prison institutions of this state to the state, or any political division thereof, or to any public institution owned or man-

aged and controlled by the state, or any political division thereof as provided in section one hundred eighty-four of the correction law..

2. This act shall take effect January nineteenth, nineteen hundred thirty-four."

10. That prior to the 28th day of February, 1933, the corresponding provision of the New York General Business Law, amended by the Act hereinabove set forth in paragraph 9 hereof, was as follows:

> §69. Sale of convict made goods manufactured or mined in other states. No goods, wares, or merchandise, manufactured or mined by convicts or prisoners of other states, except convicts or prisoners on parole or probation, shall be shipped into this state to be sold on the open market, or sold to, or exchanged, with an institution of this state or with any of its political subdivisions.

11. By virtue of Section 69 of the General Business Law as amended and as hereinabove set forth in paragraph 9 hereof, the plaintiff may not carry on his business of selling within this state merchandise manufactured by prisoners and convicts of states other than the State of New York not on parole or probation.

12. The Legislature of the State of New York in enacting the amendment to Section 69 of the General Business Law, effective January 19th, 1934, established it as a public policy in the exercise of the sovereign power of the State that the unfair and unjust competition of the products of convict and prison labor was detrimental to the interests of the products of free labor and that it was necessary under the conditions

existing to protect the said products of free labor from such unjust competition by the enactment of the provisions stated in Section 69 of the General Business Law.

CONCLUSIONS OF LAW.

The Court reaches the following conclusions of law:

1. The enactment of January 19th, 1929, of the Congress of the United States, entitled "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases" (Chapter 79, 45 Statutes 1084) is a valid and constitutional law entitled to full force and effect.

2. Chapter 26 of the Laws of 1933 of the State of New York, constituting an amendment to Section 69 of the General Business Law, is a valid exercise of the sovereign power of the State of New York and does not constitute a denial of due process of law.

3. The plaintiff is not entitled to injunctive relief restraining the enforcement of Section 69 of the General Business Law of the State of New York as amended by Chapter 26 of the Laws of 1933.

4. Defendant is entitled to a judgment dismissing the complaint upon the merits.

Dated: August 22nd, 1934.

CHRISTOPHER J. HEFFERNAN,
Justice of the Supreme Court.

Stipulation.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney General of the State of New York,
Defendant.

IT IS HEREBY STIPULATED by and between counsel for the parties to the above entitled action that judgment may be entered upon the findings of fact and conclusions of law of the defendant before any Justice of the Supreme Court with the same force and effect as if entered by order of Mr. Justice John T. Loughran.

Dated: July 31, 1934.

MORTIMER FISHEL,
Attorney for Plaintiff.

JOHN J. BENNETT, JR.,
Attorney General
for himself.

Memorandum.

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,
Plaintiff,
against
JOHN J. BENNETT, JR., as Attorney
General of the State of New York,
Defendant.

ULSTER SPECIAL TERM

(December, 1933)

Action to restrain enforcement of the Hawes-Cooper bill (Act of January 1929, ch. 79, 45 Stat. 1084, 49 U. S. C. A. 65) and New York Business Law 69 (L. 1933, ch. 26).

MORTIMER FISHEL, for plaintiff.
HENRY EPSTEIN, Solicitor General for defendant.

(LOUGHRAN, J.)

The Act of Congress is assailed as an attempt (1) to delegate to the states the exclusive Federal power over interstate commerce; or (2) to control production of innocuous goods so as to equalize competition in industry. I am of opinion that the basis to neither objection inheres in the Act. Congress may affirmatively assent to an exercise of state police power otherwise valid, although interstate commerce is thereby limited.

(*In re Rahrer*, 140 U. S. 545.) Control of the disposition of prison goods in one state (if a legitimate end of the police power there) is not essentially the regulation of their production in another state (*cf.* Hammer v. Dagenhart, 247 U. S. 251).

The New York statute is challenged as obnoxious to the due process clauses. That challenge, I think, is invalid. It is the policy of the state, as declared by the statute, "to protect free labor from the unjust competition of convict labor,"—a policy persistently asserted for more than a generation (L. 1894, ch. 696; L. 1928, ch. 805). It is sound to keep convicts at work. The products of free labor must be marketed at a profit. If there be conflict between these objectives, the choice was for the legislature (*Barbier v. Connolly*, 113 U. S. 27; *Noble State Bank v. Haskell*, 219 *id.* 104; *Central Lumber Co. v. South Dakota*, 226 *id.* 157, 160). The cases cited by plaintiff (*People v. Hawkins*, 157 N. Y. 1; *People v. Raynes*, 136 App. Div. 417; aff'd 198 N. Y. 539, 662) are not here controlling. In the *Hawkins* case only one member of the court took the position that the legislation there reviewed amounted to a denial of due process. Final determination of the *Raynes* case also turned on the commerce clause (198 N. Y. 622).

Judgment for the defendant.

Dated January 5, 1934.

FILE COPY

JAN 31

CHARLES

IN THE

Supreme Court of the United States

October Term, 1935

No. 377

Asa H. Whitfield,

Petitioner,

vs.

The State of Ohio,

Respondent.

BRIEF OF STATE OF MINNESOTA AMICUS CURIAE.

HARRY H. PETERSON,
Attorney General,
State of Minnesota,
St. Paul, Minnesota.

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IN THE

Supreme Court of the United States

No. 377

October Term, 1935

Asa H. Whitfield,

Petitioner,

vs.

The State of Ohio,

Respondent.

MOTION FOR LEAVE TO FILE.

Now comes the State of Minnesota, appearing by its Attorney General, Harry H. Peterson, and moves this Honorable Court for permission to file a brief, amicus curiae, in support of the position of the appellee, the State of Ohio, in the above entitled appeal, before this court.

HARRY H. PETERSON,
Attorney General,
State of Minnesota.
St. Paul, Minnesota.

IN THE

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No. 377

October Term, 1935

Asa H. Whitfield,
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vs.

The State of Ohio,
Respondent.

BRIEF OF STATE OF MINNESOTA AMICUS CURIAE.

INTRODUCTION.

The State of Minnesota is interested in the determination of this case because it has enacted laws pursuant to the so-called Hawes-Cooper Act. Minnesota has upon its statute books two laws which were enacted because of the provisions of the Hawes-Cooper Act. They are Laws of Minnesota, 1935, Chapter 267, which provides that prison made goods shall be subject to the Laws of the State of Minnesota immediately upon arrival therein and shall not be exempt from such laws by reason of being introduced in the original package or otherwise; and Laws of Minnesota, 1935, Chapter 268, which requires all prison made goods offered for sale within the State to be branded and marked as such and providing penalties for sales and violation thereof. These laws were enacted to supplant Laws of Minnesota, 1929, Chapter 138, which contains somewhat similar regulations. Each of these is printed in the appendix.

The policy of the State of Minnesota with respect to prison made goods differs from that of Ohio and many other States in that it simply requires the branding and labeling of the same. Many other States have similar laws. Minnesota has pursued such a policy with respect to other goods and merchandise for many years. While Minnesota permits the sale of goods and merchandise, the traffic in which is subject to evils requiring regulatory legislation, it has enacted such laws for the protection of the public. These laws have for their purpose not only the protection of free labor, but the protection of the public against deception and fraud. In 1890 the Supreme Court of Minnesota decided a case and states the policy of Minnesota in this respect.

In Stolz v. Thompson, 44 Minn. 271, an action was brought to recover $250 for goods sold and delivered, which consisted of a product known as "Gates' Crystal Baking Powder." The defense was that this powder contained alum, but the cans and boxes were not labeled or marked in any way to show the fact and that, therefore, they were sold and disposed of to the defendant in violation of the Laws of Minnesota of 1889, Chapter 7. It was claimed that this law was unconstitutional because alum is not injurious to health, but on the contrary is a wholesome article of food. In the opinion this Court said:

"The statute does not prohibit the manufacture or sale of baking powder containing alum, but requires the fact, when alum is a constituent of it, to be disclosed in the manner specified. We have no doubt that it is within the power of the legislature to impose this requirement. We need not enter upon a consideration of the question as to whether the use of alum in food in such quantities as might be included in a baking powder is or is not injurious to health. The validity of that part of the law which we are considering does not depend upon the fact being that it is injurious. As to that fact we will only say that there has long existed a belief, more or less general, that the use of alum as an ingredient in food is harmful; and as early at least as about the middle of the last century (31 Geo. II. c. 29, § 21) the use of alum as an ingredient of bread was prohibited. Such prohibition was renewed in later statutes, and as late as 35 & 36 Vict. c. 94, its use in intoxicating liquors was prohibited. We deem it immaterial whether the enactment under consideration was induced by a belief on the part of the legislature that such use of alum was injurious, or by the supposed fact that a large proportion of the people believed it to be so, and would not purchase or use in their daily food a composition containing it, unless the fact were concealed from them. In either case the law requiring the marking of the packages containing the compound so as to show the fact would not be subject to objection on constitutional grounds. The use of such compounds, generally designated as 'baking powder,' has become very common, if not almost universal, in the preparation of food. *It cannot well be doubted that it is a common right of the people to be informed, so far as that is reasonably practicable, if the substances exposed for sale as food contain ingredients which are actually hurtful, or which they believe to be so, and which therefore they would not knowingly purchase or use.*

> "One of the grounds justifying the interference by the legislature to regulate the carrying on of ordinary business affairs is the fact that unless a preventive remedy be applied people will in general, or very commonly, be imposed upon, the circumstances being such that ordinary personal caution will be ineffectual to guard against it."

Minnesota has prison industries of its own and complies with the requirements of its statutes as to the branding and labeling of its own prison products. It is in the same position as Ohio and other States with respect to the constitutionality of the Hawes-Cooper Act, and, therefore, files this brief.

HISTORY.

Many of the States passed laws regulating the traffic in convict made goods, which were held to be unconstitutional, because they interfered with interstate commerce. A statute passed by the State of Ohio providing for the licensing of persons and corporations selling convict made goods within the State was held unconstitutional in 1897 in Arnold v. Yanders, 56 Oh. St. 417, 60 Am. St. Rep. 753, upon the grounds that the statute interfered with interstate commerce.

A statute of the State of New York requiring that goods made by convicts be labeled or marked "convict made" was held unconstitutional in 1898 in People v. Hawkins, 157 N. Y. 1, 42 L. R. A. 490, upon the grounds that the law interfered with interstate commerce and upon the further grounds that the statute constituted a taking of the property of the seller without due process of law in violation of the 14th Amendment. A bill relative to the marking of goods made in penal institutions was held to be unconstitutional by the Supreme Judicial Court of Massachusetts in 1912 in Opinion of Justices, 211 Mass. 605, Ann. Cas. 1913B 815, upon the grounds that the statute interfered with interstate commerce.

In each of these cases it was pointed out that Congress has the sole and exclusive power to regulate interstate commerce and that in the absence of an affirmative regulation by Congress, it must be taken as its will that such ~~Congress~~ Commerce be free and unrestrained. The failure of Congress was construed to be a regulation that traffic in such goods should be free until Congress otherwise provided. It was thought that, if Congress saw fit, it could remove the impediment to State action by modifying the regulation so as to permit the States to make convict made goods subject to their laws upon arrival within the States in the same manner that intoxicating liquors were made subject to State laws by the enactment of the Wilson Act. The Hawes-Cooper Act was passed to remove this impediment and the several States have enacted laws of various kinds to enable them to carry out their own domestic policies, unobstructed by the impediments of Congressional regulation or power with respect to the matter.

I.

The Hawes-Cooper Act Is Constitutional.

The Hawes-Cooper Act (45 Stat. 1084; 49 U. S. C. A. § 65) does not prohibit the transportation of prison made goods in interstate commerce. On the contrary it permits such transportation and traffic in such goods. It does not grant any powers to the State with respect to prison made goods. It simply removes the impediments of national regulation by

Congress so that the States shall be able to exercise the powers they already possess with respect to such goods. This, we think, is definitely settled by the decision of this Court in In re Rahrer, 140 U. S. 545, which upheld the constitutionality of the Wilson Act and which contains an elaborate discussion of the question here involved.

Before taking up the Rahrer case, it seems to us that the scope of its decision is made plain by a brief consideration of the cases which preceded it, as well as those which have since been decided by this Court. The first of these cases is Bowman v. C. & N. W. Ry. Co., 125 U. S. 465, which was an action to recover damages for wrongful refusal by defendant as a common carrier to receive and transport from Chicago, Illinois, to Council Bluffs, Iowa, a certain quantity of intoxicating liquor (beer). The defense was that the statute of Iowa prohibiting traffic in intoxicating liquors forbids any common carrier to bring within the State of Iowa any intoxicating liquor without a certificate from the County Auditor of the county in which the consignee resides, to the effect that the consignee to whom said liquor is to be transported and delivered is authorized to sell intoxicating liquors in the county. In reply to this defense the plaintiff claimed that so much of the statute as prohibited the transportation of intoxicating liquors into Iowa and delivery thereof to the consignee therein was unconstitutional, because it was an interference with interstate commerce. This Court stated that intoxicating liquors are subjects of commerce and are to be treated as such. It then pointed out that interstate commerce in goods is national in scope and unless regulated by Congress itself is free from any restrictions at all. At page 485, the following language is used:

> "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases *by the express permission of Congress.*"

In answer to the claim of Iowa that the prohibition was a State inspection law, this Court said at pages 488 and 489:

> "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to *any known article of commerce,* irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

This Court pointed out that a State has legislative control, exclusive of Congress, of all persons, things and transactions of strictly local concern, and may pass a State prohibition law. It held, however, that a State cannot make laws subjecting goods transported in interstate commerce to the laws thereof upon arrival in the State in the original package without the consent of Congress. At page 493 this Court further said:

> "It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. * * * It cannot, *without the consent of Congress,* express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."

In conclusion it was held that an Iowa prohibition law was not a valid exercise of the police power of Iowa because it operated upon merchandise still in interstate traffic. In disposing of the case this Court said at page 498:

> "The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and *property* within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the *merchandise* is brought to its border."

The judgment was reversed and the case remanded for proceeding in conformity with the opinion.

This question was again brought before this Court in the case of Leisy v. Hardin, 135 U. S. 100, which was an action in replevin brought in the State courts in Iowa to recover certain liquor shipped from Peoria, Illinois, to Keokuk, Iowa, which was there seized by the defendant as constable in plaintiff's warehouse in Keokuk. The defendant justified the seizure under the State prohibition law of Iowa. This Court dealt with intoxicating liquors as if they were any other commodity of commerce, not subject to the recognized inherent evil qualities of intoxicating liquors; that intoxicating liquors are lawful subjects of interstate commerce and held that in the absence of Congressional permission the States have no power to legislate with respect to the same while they are in interstate commerce. At page 110 the following language is used:

> "That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, *like any other*

> *commodity* in which a right of traffic exists, and are so recognized by the usage of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus *articles of commerce,* can a State, *in the absence of legislation on the part of Congress,* prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importers?"

At pages 124-5 this Court indicated that if Congress would give its permission the State would have the power to make intoxicating liquors subject to its laws immediately upon arrival therein. It said:

> "The plaintiffs in error are citizens of Illinois, are not pharmacists and have no permits, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman v. Chicago &c. Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that *in the absence of congressional permission to do so,* the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

On page 125 intoxicating liquors are referred to as "articles" and "subjects of interstate commerce" and finally on page 125 the Court suggested cooperation between the State and the Federal governments in the following language:

> "to use the language of Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat. 1, 238, in 'a frank and candid cooperation for the general good.' "

The decision of the court below was reversed and the case remanded.

These decisions were handed down immediately prior to the enactment of the Wilson Act. The Wilson Act was then passed in conformity with the rules laid down in these cases so as to give congressional permission to the States to enable the States to make intoxicating liquors shipped from points without such States in interstate commerce subject to the laws thereof immediately upon arrival therein, without regard to whether they were still in the original package or not. The constitutionality of the Wilson Act was shortly questioned in the case of In re Rahrer, 140 U. S. 545, which was a proceeding in habeas corpus to the Sheriff of Shawnee County, Kansas, to secure the release of the petitioner, who had been arrested on a charge preferred against him under the statute of Kansas for having in his possession certain beer shipped to him in kegs and barrels by a firm in Kansas City, Missouri. The petitioner claimed that the goods were shipped to him in interstate commerce; that they were still in the original packages when the arrest was made. The defendant justified the arrest under the laws of Kansas and he asserted that the Wilson Act had removed any obstacles and impediments to their enforcement by providing that such liquor shall be immediately subject to the laws of the State upon arrival therein. This Court sustained the contentions of the Sheriff. In answer to the claim that the Commerce Clause of the Constitution of the United States insured that interstate commerce shall be free and that Congress had no power to pass laws restricting such freedom of interstate commerce, Chief Justice Fuller, at page 555, said:

> "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. *The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regu-*

> *late it, it was left free except as Congress might impose restraint.* Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States."

It was pointed out further that while intoxicating liquors are subject to the laws of the State which may even prohibit all traffic therein, Congress has the power to regulate the interstate commerce in them "like any other commodity." At page 556 this Court further said:

> "Unquestionably, fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of the courts. Nevertheless, it has been often held that state legislation, which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of a State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto."

It was again pointed out that, under the rules laid down in Bowman v. C. & N. W. Railway Co., and Leisy v. Hardin, such traffic was free and unrestrained and not subject to State laws until Congress legislated to give its permission to allow the State laws to operate upon it. In speaking of this, this Court said, at pages 559-60:

> "The laws of Iowa under consideration in Bowman v. Railway Company, 125 U. S. 465, and Leisy v. Hardin,

> 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, *so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it,* Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. *It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.* .
>
> "*Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature.* Is the law open to constitutional objection?"

Then the Court pointed out that there are certain powers which the States are forbidden to exercise, calling attention to Article 10, Section 1, Clause 1 of the Constitution and certain powers which they may exercise with the consent of Congress—id. Clauses 2 and 3. It was then pointed out that Congress cannot confer legislative power to a State nor adopt State laws as its own. At page 560 this Court said:

> "Nor can Congress transfer legislative powers to a State nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power."

It was urged, however, that the effect of the Wilson Act was a delegation of the legislative power of Congress to the State with respect to the subject of intoxicating liquors. In holding that Congress cannot delegate its power in this manner, it was said (pages 560-61):

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. *This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates ex proprio vigore as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State.* In other words, *it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things,* and that not only may intoxicating liquors be imported from one state into another, without being subject to regulation under the laws of the latter, *but that Congress is powerless to obviate that result.*"

It was then pointed out that, in the absence of the Commerce Clause, the States had full power to deal with the entire subject of intoxicating liquors; that the Commerce Clause operated as a grant of power to Congress to regulate this subject, and that any regulation by Congress was an impediment to State laws which rendered them unconstitutional in so far as they came in conflict therewith. Inasmuch as the failure of Congress to act was construed to mean that

so far as relates to interstate commerce the rule shall be that such commerce shall be free and unrestrained, the States had no power to act in the absence of congressional permission. It was pointed out that if Congress did act it necessarily must establish regulations limiting that freedom from restraint, which prevailed in the absence of such regulation. At page 561 thereof this Court said:

> "*Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever.* We do not concur in this view. *In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.*
>
> "By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. * * * *But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate com-*

> *merce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."*

It was held that regulation included the power of Congress to prescribe the manner and means of introducing articles in interstate commerce into the States and that no reason was perceived why Congress could not establish a rule which divested such goods of their interstate character than would otherwise be the case. At page 562 this Court said with respect to this matter:

> "The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.
>
> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.
>
> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent."

Finally, this Court was careful to point out that the effect of the Wilson Act was not to grant power to the States to act. The States already had such power. It "simply removed an impediment to the enforcement of the State laws." At page 564 this Court said:

> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence

> of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In conclusion it was held that the Wilson Act rendered the liquor subject to the laws of Kansas upon arrival therein in the original packages and that the petitioner was subject to arrest and detention under the laws of said State.

That the power of Congress to regulate interstate commerce includes the power to prescribe the manner of introducing goods into the respective States and to set the time at which such goods shall be subject to the laws of the States has been reiterated many times by this Court. It has been so held not only with respect to intoxicating liquors, but to other articles of merchandise which are properly subject to regulation, i. e., oleomargarin, as was held in the Schollenberger case infra. In addition to the cases which we have cited, we call the Court's attention to Lyng v. Michigan, 135 U. S. 161. In that case it was held that such a regulation was not valid because not sanctioned by Congress. At page 166 it was held that the regulation was unconstitutional, it "not being sanctioned by the authority, express or implied, of Congress, was invalid because repugnant to the Constitution of the United States." This rule was stated in Rhodes v. Iowa, 170 U. S. 412, Vance v. Vandercook, 170 U. S. 438, Vance v. Vandercook, 170 U. S. 468 and in Rosenberger v. Pacific Express Company, 241 U. S. 48. In an opinion by Chief Justice White, the last cited case, it was pointed out:

(a) that from the beginning the States were without power to directly burden interstate commerce;

(b) that the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would, that is, after delivery but before sale in the original packages; and

(c) that the power to ship such goods in interstate commerce includes the right to make C. O. D. agreements as to the sale thereof.

Of these propositions the Court, at page 51, said:

> "These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined as shown by the cases cited in the margin, that there is no necessity for going further."

In the margin are cited Leisy v. Hardin, In re Rahrer, Rhodes v. Iowa, Vance v. Vandercook and other cases.

In Schollenberger v. Pennsylvania, 171 U. S. 1, it was held that a Pennsylvania statute regulating the manufacture and sale of oleomargarin was unconstitutional in so far as it related to interstate shipments of the same. The Court pointed out that the right of the state to prohibit the sale in the original package was denied to the State in the absence of any law of Congress upon the subject permitting the state to prohibit such sale and that there is no law of Congress relating to articles like oleomargarin. It was, therefore, held that such oleomargarin is in like condition as were the liquors in Leisy v. Hardin and the numerous other cases cited in the opinion. The Court pointed out, however, that as to articles like oleomargarin which are subject to regulation Congress can give its permission. At page 23 the Court said:

> "Subsequent to the decision in the Leisy case and on the 8th of August, 1890, c. 728, 26 Stat. 313, Congress passed an act commonly known as the Wilson act, which provided that upon the arrival in any State or Territory of the intoxicating liquors transported therein they

should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its police power to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress. In re Rahrer, Petitioner, 140 U. S. 545. *In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State.*"

It is claimed by the Petitioner that the first Child Labor Case, Hammer v. Dagenhart, 247 U. S. 251, is decisive that the Hawes-Cooper Act is unconstitutional. We submit that there is not even any likeness between the two statutes. We submit that there is no analogy between them. In the Child Labor Case it was held that Congress under the guise of the power to regulate interstate commerce attempted to regulate the internal affairs of the States by prohibiting the employment of children in industry. The Hawes-Cooper Act is not an attempt at all to regulate the internal affairs of States. Like the Wilson Act it is in aid of the exertion of the powers of State governments and leaves the scope thereof entirely to the States. In the language of the Rahrer case it but removes an impediment to State legislation. It was so held by the Supreme Court of the State of Wisconsin in the case of State v. Whitfield, — Wisc. —, 257 N. W. 601.

In Baldwin v. Seelig, 294 U. S. 511, Leisy v. Hardin is cited at page 528 and the rule of that case is recognized. The power of Congress to give its consent to the operation of State laws upon articles shipped in interstate commerce is recognized. If the State law has for its purpose the application of the State's domestic policy, rooted in its conceptions of morality and order, such regulations are permissible.

II.

Prison Made Goods Are Subject to the Police Powers of the States.

A.

The Scope of the Police Power.

The early decisions of the federal courts, as we interpret them, quite generally limited the exercise by the state of its police power to matters affecting the public health, public morals and public safety, but in the last half century this limitation has been abandoned and these courts, as well as many of the state courts, have enlarged by judicial interpretation the scope of this power to meet the requirements of changing economic and industrial conditions and the growth of the states and the nation. It is now, we think, the consensus of the judicial opinion that the state may exercise its police power not only for the promotion and protection of the public health, public morals and public safety, but also to promote the wealth and prosperity, the comfort, convenience, and happiness, in short, the general welfare of the people of the state.

Black on Constitutional Law (4th Ed.), page 366.
Barbier v. Connolly (1885), 113 U. S. 27.
Mugler v. Kansas (1887), 123 U. S. 623.
Camfield v. U. S. (1897), 167 U. S. 518;

C. B. & Q. Ry. Co. v. People (1906), 200 U. S. 561.

Sligh v. Kirkwood (1915), 237 U. S. 52.

Blaisdell v. Home Building and Loan Association (1933), 189 Minn. 442, 448; 249 N. W. 334, 893; 290 U. S. 398; 54 S. Ct. 231.

In C. B. & Q. Ry. v. People, supra, at page 592 this court said:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. * * * We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. Lake Shore & Mich. South. Ry. v. Ohio, 173 U. S. 285, 292; Gilman v. Philadelphia, 3 Wall. 713, 729; Pound v. Turck, 95 U. S. 459, 464; Railroad Co. v. Husen, 95 U. S. 470. And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation."

In Sligh v. Kirkwood, supra, at page 58, the court said:

> "The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as

> men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. Camfield v. U. S., 167 U. S. 518, 524. *It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or public health.* Chicago, etc., Ry. v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity.' And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' Eubank v. Richmond, 226 U. S. 137, 142."

It was long ago decided in the Legal Tender Cases (1870), 12 Wall. 457, that "It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times." (P. 540). This principle has been reaffirmed by our courts many times since, and it is now well established that in emergencies state and nation alike may, under the police power, pass laws which in normal times would impair the obligation of contracts and deprive persons of their property without due process of law.

In Barbier v. Connolly (1885) supra, at page 31, the court said:

> "Neither the Amendment (referring to the Fourteenth) —broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

In Manigault v. Springs (1905), 199 U. S. 473, at page 480, the court said:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power which in its various ramifications is known as the police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In Atlantic Coast Line Railroad Co. v. City of Goldsboro (1914), 232 U. S. 548, at page 558, the court said:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of a state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained

> away, and is inalienable even by express grant and that all contracts and property rights are held subject to its fair exercise."

In Union Dry Goods Co. v. Georgia Public Service Corporation (1919), 248 U. S. 372, at page 376, the court said:

> "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government and no obligation of a contract can extend to defeat the legitimate government authority. * * * It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community."

In New Orleans Gas Co. v. Louisiana Light Co. (1885), 115 U. S. 650, at page 672, the court said:

> "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety as the one or the other may be involved in the execution of such contracts."

In Marcus Brown Holding Co. v. Feldman (1921), 269 F. 306, affirmed in 256 U. S. 170, the court, at page 315, said:

> "It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not 'to be interpreted with the strictness of a private contract.' Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state (Atlantic, etc., Co. v. Goldsboro, 232 U. S. 548,

34 Sup. Ct. 364, 58 L. Ed. 721); that in like manner 'reasonable restraints' may be placed upon freedom of contract (Rail & River Co. v. Ohio, etc., Comm'n, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607); and that a Legislature may make police regulations, although they interfere with the full enjoyment, of private property, and no compensation be given (Chicago, etc. Co. v. Drainage Comm'n, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175). Such decisions (and we cite but few of many) reduce the question to this: Are these statutes an exercise of police power reasonably suitable for combating or lessening the evil proved, and therefore constitutional, although at other times and under other circumstances they might plainly be obnoxious to fundamental principles of constitutional government?"

In People v. LaFetra, 230 N. Y. 429, 442; 130 N. E. 601, 605, the court said:

> "The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract is abridged. * * * The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare. * * *
>
> "Emergency laws in time of peace are uncommon, but not unknown. Wholesale disaster, financial panic, the

> aftermath of war (Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 161, 40 Sup. Ct. 106, 64 L. Ed. 194), earthquake, pestilence, famine and fire, a combination of men or the force of the circumstances may, ~~as~~ the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (Bowditch v. Boston, 101 U. S. 16, 18, 19; American Land Co. v. Zeiss, 219 U. S. 47. Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281), an emergency may afford a reason for putting forth a latent government power already enjoyed but not previously exercised."

In Guttag v. Shatzkin, 230 N. Y. 647, 650; 130 N. E. 929, 930, the court said:

> "While the states are subject to the contract clause of section 10, article I, and section 1, article XIV of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372. These sections of our federal Constitution and the police power of the states harmonize and never conflict."

In Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 437, it was held that the economic interests of the State may justify the exertion of the police power.

In the case of Nebbia v. New York, 291 U. S. 502, it was held that both property and contract rights must yield to the public good if necessity requires. At page 523 of the opinion, this Court says:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form 'a portion of that immense mass of legislation, which embraces every thing within the territory of a State. * * * all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, * * * are component parts of this mass.' "

It was pointed out that the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases and that certain kinds of business may be prohibited in the public interest (Pages 527-28). It is not necessary that a business be inherently bad in order to subject it to police regulation. It is sufficient to subject a business to police regulation if its results are evil.

In Booth v. Illinois, 184 U. S. 425, a statute prohibiting the sale of stock and grain on margin was sustained. It was pointed out that such business is not immoral (Page 429), but that the business results are evil because of interference with prices and delivery (Page 430). We shall point out infra that the traffic in convict made goods results in interference with prices and demoralizes business and results in social evils, which justify the exertion of the police power to suppress the evils resulting therefrom.

In Brodnax v. Missouri, 219 U. S. 285, a similar statute of Missouri prohibiting sales of stocks, bonds and certain commodities on margin was held to be constitutional. It was pointed out that such transactions in themselves are not immoral or inherently bad, but that the effect of such dealing in such contracts has a bad effect upon business and public morals (Pages 292-93).

In Otis v. Parker, 187 U. S. 606, a provision of the Constitution of California prohibiting dealings in stocks and bonds upon margin was held to be constitutional. It was pointed out that such dealings in themselves are not inherently bad and that they are not immoral. It was also pointed out that such dealings have resulted in evil social consequences and that the Court was unable to say that the constitutional provision did not bear a reasonable relation to the evil sought to be cured and that it was constitutional (Pages 608-9).

In Murphy v. California, 225 U. S. 623, an ordinance prohibiting pool rooms was held to be constitutional. It was held that playing at billiards is a lawful amusement (Page 629); that the ordinance was aimed at the place in which the game is played and not at the game (Page 619) and that it was a proper exercise of the police power to suppress the evils resulting from the game, citing and quoting Booth v. Illinois, supra (Pages 629-30).. This case was followed in Clarke v. Deckebach, 274 U. S. 392, upholding an ordinance of Cincinnati prohibiting the operation of pool rooms by aliens (Page 397).

In McCloskey v. Tobin, 252 U. S. 107, a statute prohibiting the soliciting of claims by one not an attorney at law was sustained, although the business itself is "not inherently evil" (Page 108).

In Powell v. Pennsylvania, 127 U. S. 678, a statute of Pennsylvania was upheld which prohibited the manufacture or sale of oleomargarin. It was pointed out that oleomargarin is a wholesome, nutritious food; but that by reason of the fact that fraud and deception is practiced in the business by which the public is induced to purchase oleomargarin instead of butter and which the public would not buy if it were advised as to the transaction. It was held that inasmuch as the business results in these evils the Legislature was justified in prohibiting it (Page 686).

In Baccus v. Louisiana, 232 U. S. 334, it was held that the peddling of drugs or medicines may be prohibited, even though the business itself is not an evil one, but because of evil consequences which flow from it.

Upon the same grounds, it was held in Dillingham v. McLaughlin, 264 U. S. 370, that a statute was constitutional which prohibited any other than a corporation from engaging in the banking business.

Each and every of the statutes upheld in the cases which we have just cited related to businesses which in themselves are not harmful. Some of these businesses are attended with evil consequences and practices, which this Court has held justified the exertion of the police power to regulate and suppress them at the discretion of the State Legislature.

B.

The Traffic in Convict or Prison Made Goods Is Attended With Evils Which Justify the Exertion of the Police Power.

It is attended with fraud, deception and unfair trade practices. These consist in many instances of labels upon said products which would lead the purchaser to believe that the same were manufactured in a factory by a regular manufacturer. We feel confident in the assertion that, in the absence of legislation requiring it, such goods never bear a label showing that they were made in a prison or by convict labor. As a matter of fact the contracts of the contractors with the prison authorities for such products generally contain a clause that the contractor shall have a right to rescind the contract if Federal or State legislation shall be enacted requiring a label to show the origin of such goods. Such a contract is printed in full in the case of Rice v. State, 108 Okla. 4, 232 Pac. 807. That contract was one between the Cherokee Manufacturing Company and the State of Oklahoma by which the State agreed to manufacture certain shirts and garments for the company. In the contract it is provided that labels shall be attached and that the cloth and all other goods used in the manufacture of the garments shall be subject to the approval of the company. These goods are then sold by the company as its product. To protect itself against such legislation Section 8 of the Contract, which is printed in the opinion, provides that the company shall have a right to cancel the contract if Federal or other legislation shall require it to label its goods so as to show that they were made in a prison. These goods are marketed not as prison made goods, but as the goods of a manufacturer.

That this is an unfair trade practice and a deception and a fraud upon the public is established by all the decisions.

A representation by one marketing goods that he is a manufacturer when he is not is a deception and fraud and unfair practice, which may be suppressed by the exercise of governmental power. It was held that Congress may suppress such practices in interstate commerce through the Federal Trade Commission by this Court in the case of Federal Trade Commission v. Royal Milling Company, 288 U. S. 212. In that case the respondent marketed pancake and other flour which it purchased from other manufacturers. The article was put up and sold by the defendant as its product under the name of the Royal Milling Company. It was held that the use of the words "milling company" and other words of like import would lead the purchaser to believe that he was purchasing a product of the respondent when in fact he was not and that thereby a deception was perpetrated and an unfair practice indulged in. In speaking of the practice of the defendant, this Court, at page 215, said:

> "Respondents have circulated written and printed circulars among the trade which either directly assert, or are calculated to convey the impression, that their product is composed of flour manufactured by themselves from the wheat."

Of the right of the public to know what it is purchasing, at page 216, the Court said:

> *"If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon*

> *them an exactly similar article, or one equally as good, but having a different origin."*

It held that the respondent's acts deceived the public and that the Federal Trade Commission was justified in making an order to desist from using the words "milling company" or other words of like import and at page 217 the Court further said:

> "The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, *and which they might or might not buy if correctly informed as to its origin.* We are of the opinion that the purchasing public is entitled to be protected *against that species of deception, and that its interest in such protection is specific and substantial."*

Not only are prison made goods sold under labels which do not disclose their origin and which deceive the public into believing that they are made in factories instead of prisons, but in many cases as the records of the Senate Committee disclose, such goods bear false labels and are dumped into the markets of the States to demoralize and ruin business. Rep. No. 344, U. S. Senate, 70th Congress, 1st Session, Page 4. It is a well known fact, too, that these goods are dumped upon the markets by dealers at sales which are widely advertised, in which the dealers assert that they have purchased a large quantity or an entire output of such products. People are led to believe that the merchant has purchased the entire output of a manufacturer and that he is enabled to charge a low price for the goods because of the large purchase which he has made. The fact of the matter is that the merchant is enabled to charge a low price because the goods are prison or convict made and this fact is carefully concealed from the public.

The right of regulation exists even though no private rights are invaded. The public has rights in this respect which can be and are protected by legislation. In Federal Trade Commission v. Klesner, 280 U. S. 19, at page 27, this Court said:

> "But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. *Public interest may exist although the practice deemed unfair does not violate any private right.* In Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441, a practice was suppressed as being against public policy, *although no private right either of a trader or of a purchaser appears to have been invaded.*"

To the same effect is Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483.

In Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, it was held that the marketing of California Pine as White Pine is a deception and a fraud and unfair practice which the Federal Trade Commission was justified in suppressing. This decision emphasizes the right of the public to get what it chooses, even though the choice may be dictated by caprice or by fashion or even by ignorance. At page 78 this Court says:

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. *The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.* Federal Trade Comm'n v. Royal Milling Co., 288 U. S. 212, 216; Carlsbad v. W. T. Thackeray & Co., (C. C.)

57 Fed. 18. *In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."*

In Sears, Roebuck & Company v. Federal Trade Commission, (7th CCA) 258 Fed. 307, 6 A. L. R. 358, the petitioner was found guilty of having indulged in unfair trade practices which the Commission had suppressed. These consisted of representations of buying sugar, coffee and tea in large quantities from producers, even in foreign countries, and that by reason thereof petitioner was able to sell the same at a lower price than its competitors. The inference was that petitioner's competitors overcharged the public. It was held in that case that one may be found guilty of intentionally injuring and discrediting competitors by falsely leading the public to believe that they were unfair dealers by falsely advertising that because of petitioner's handling commodities in large quantities and buying direct from manufacturers and producers his goods cost less and therefore could be sold for less. The order of the Federal Trade Commission that petitioner desist from such practice was sustained. The decision in this case denounces the practices, which attend the traffic in prison made goods—misrepresentations as to the origin of goods, which in the case at bar consists of representing the goods as being those of manufacturers instead of being prison made; that the price is low by reason of purchases by dealers of large quantities or entire outputs of factories instead of their being low on account of being prison made, and causing labels to be attached which are calculated to convey the impression that the goods are made by a manufacturer in a factory instead of in a prison by convicts. In short the practices of prison contractors and merchants, who dispose of prison made goods, are of such character as to justify the exertion of the police power to regulate and suppress them.

That the public has a right to be advised as to the goods which it purchases is well settled. Nobody has a right to represent his goods as the goods of somebody else. Nobody has a right to make any false, misleading or deceptive representations as to his goods. It is not necessary that an express representation be made. It is sufficient if the goods are marked in such a way as to result in the public's being deceived or misled.

In Charles Broadway Rouss, Inc. v. Winchester Co., 300 Fed. 706, at page 715, the Court says:

> "As Lord Halsbury said in Reddaway v. Banham (1896) A. C. 199, *nobody has any right to represent his goods as the goods of somebody else. That principle of law underlies all the decisions in the cases involving unfair competition.*"

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, Chief Justice Fuller said:

> "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, *and the public is entitled to the means of distinguishing between those, and other goods; and protection is accorded against unfair dealing, whether there be a technical trade mark or not.* The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In the case of Corn Products Refining Company v. Eddy, 249 U. S. 427, a statute of Kansas requiring that all syrup compounds be branded and labeled so as to show the ingredients thereof was held to be constitutional. At page 431 Justice Pitney said:

> "And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.
>
> "Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."

Statutes of Iowa and Pennsylvania providing that manufacturers of ice cream shall state the butter-fat content thereof were held to be constitutional in Hutchinson Ice Cream Company v. Iowa, 242 U. S. 153, in which this Court said:

> "Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."

A similar State statute of North Dakota requiring the labeling of lard so as to state the ingredients thereof and the sale of it in cans containing 1, 3 or 5 pounds or multiples thereof was held to be constitutional in Armour & Co. v. North Dakota, 240 U. S. 510.

In Heath & Milligan Manufacturing Company v. Worst, 207 U. S. 338, a statute of North Dakota requiring the labeling of paint containers and stating the ingredients of the paint was held to be constitutional.

In Savage v. Jones, 225 U. S. 501, a statute requiring the labeling of commercial feeding stuff, stating the ingredients thereof, was held to be constitutional.

In State v. Buck Merc. Company, 38 Wyo. 47, 57 A. L. R. 675, a statute was upheld which required the disclosure by label of materials or ingredients of certain articles sold and to specify the wool content thereof. Numerous other instances could be cited—

- Schmidinger v. Illinois, 226 U. S. 578 (weight of bread);
- Stolz v. Thompson, 44 Minn. 271, supra (contents of baking powder);
- State v. Aslesen, 50 Minn. 5; (contents of lard substitutes);
- State v. McKay, 137 Tenn. 280, Ann. cas. 1917 E, 158 (purity of seeds).

In Parrott & Company v. Benson, 114 Wash. 117, 194 Pac. 986, the Court said:

> *"We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is."*

These authorities establish beyond any doubt that the business of dealing in prison or convict made goods is attended with evils that justify the exertion of the police power to suppress them and protect the public. They are a complete answer to the opinion of O'Brien, Judge, in People v. Hawkins, supra, in which he stated that the public does not have the right to know the origin of the goods or any of the other matters relating to the same. They demonstrate the correctness of the views expressed in the dissenting opinions by Parker, Ch. J. and Bartlett and Haight, J. J.

Furthermore the States are justified in exerting the police power to protect the markets from the injurious effects of dumping prison and convict made goods. The evils flowing from the traffic in convict made goods are much greater than those referred to in Booth v. Illinois, Brodnax v. Missouri, Otis v. Parker and other cases cited supra. It is much greater than the evil flowing from the operation of pool rooms, in which the idle and sometimes the criminal congregate. The traffic in prison made goods results in the demoralization of industry. It strikes down the manufacturer, the merchant and the worker. It is akin to the oleomargarin industry which this Court held in Powell v. Pennsylvania, supra, may be suppressed by a State because of its attendant evils and harmful consequences. It is a matter of common knowledge that industries employing free labor are required to pay taxes, interest on capital, and other items of overhead, which are not included in the cost of prison made goods, and cannot compete successfully in price with prison made goods. Nor are they subject to the business practices and other evils and injurious consequences of the latter. Prison made goods can be sold to meet the lowest prices quoted in the market and when the market is saturated a profit still can be made at a price which is below the actual cost to the products of free labor.

By the ruination of industry, commerce and labor, the income of a substantial part of the people is destroyed, which results in economic loss to those immediately affected and in the destruction in part of the market of the American farmer and in turn the latter's own purchasing power to buy the products of industry. The commerce in prison made goods is a destructive and disturbing force to manufacturing, merchandising and labor, which has its evil and harmful effects throughout the entire business structure.

From a social and economic standpoint, the unrestricted sale of prison made goods is dangerous. The social and economic situation is identical with that which arose in connection with slave labor, which was largely responsible for the impoverishment of the so-called poor white who owned no slaves and who could not compete with those owned by others. Of course, convict labor is not likely ever to assume the proportions of slave labor, but the difference in its effect is one of degree and not one of economic principle.

The Federal Government and the States have long recognized the evils flowing from convict labor and prison made goods. This has been pointed out in the authorities which we have already cited. In addition we cite Manthey v. Vincent, 145 Mich. 327, 108 N. W. 667; Shenandoah Lime Company v. Governor, 115 Va. 865; Bailey v. Alabama, 219 U. S. 219, Rep. No. 344, U. S. Senate 70th Congress, 1st Session, supra.

The policy of the United States has been to exclude prison labor from coming in competition with free labor. The importation of convict goods is prohibited. c. 356, Title III, § 307, 42 Stat. 937; c. 497, Title III, § 307, 46 Stat. 689.

The Postal Department is prohibited from purchasing convict made goods. c. 1759, § 1, 33 Stat. 435.

The inmates of narcotic farms are employed in factories or shops only to manufacture articles and commodities for the use of the United States: c. 82, § 9, 45 Stat. 1087.

The Federal Government is prohibited from procuring goods made by convict labor except as provided by existing law. c. 314, § 602, 47 Stat. 418.

Other statutes relating to this general matter have been passed by Congress.

The evils flowing from the traffic in convict made goods are recognized to be as injurious as the traffic in intoxicating liquors and oleomargarin. The difference is only in degree and not in the character of the evil resulting from such traffic.

If it is necessary under the rule laid down in Clark Distilling Company v. Western Maryland Railway Company, 242 U. S. 311, to show that the commerce regulated is subject to evils and practices which justify the States in exercising their police power with respect to the same, it has been shown, we believe, that evils and practices attend the traffic in prison made goods, which justify the exertion of the police power of the States and the regulation of interstate traffic therein by Congress.

It is no answer to this argument to say that the products of prison made labor are in themselves harmless or that they are, on the contrary, useful and beneficial. If the traffic in prison made goods is productive of harm and evil, this is a sufficient justification for the exercise of the police power. In Booth v. Illinois, supra, this Court said:

> "'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'"

In Purity Extract and Tonic Company v. Lynch, 226 U. S. 192, in upholding the statute of Mississippi which prohibits the sale of malt liquors, the Court pointed out that such liquors in and of themselves may be harmless, but that the traffic in them is productive of evils which justifies the State in entirely prohibiting the business. At page 201 this Court said:

> "It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. *It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.*"

Questions of expediency and wisdom of such legislation are for the legislative branch of the Government. In this respect, too, this case is entirely different from the first Child Labor Case. Here the purpose of the law is to regulate a business and traffic in goods which is productive of social evils and which is harmful to the public. Under the Hawes-Cooper Act it is proposed that the States themselves shall be permitted to exercise this power. In the Child Labor Case Congress itself, under the guise of exercising its power to regulate interstate commerce, attempted to regulate the internal affairs of the States so as to prohibit child labor. The argument made in the Child Labor Case that the products of child labor are harmless has no application here, because this case, in so far as relates to the police power of the States, involves the right of the States to suppress a business which is attendant with resulting consequences which are harmful and evil to the public. The only question in this respect is whether the States themselves may exercise their police power to regulate and suppress a harmful and injurious business. That the States have such power is well established by the authorities which we have cited.

CONCLUSION.

In conclusion we submit that the rule is well settled that Congress has the power to provide how prison made goods shall be introduced into the States and when the protection of the interstate Commerce laws shall cease, and that it may remove the impediments created by the Federal rules relating to interstate commerce so that the States may exercise their police power unrestrained and untrammelled by Federal regulation. We submit further that the evil that inheres and results from the traffic in prison or convict made goods is such as to justify the States in exerting their police power in regulating and suppressing the same in the discretion of the Legislatures of the respective States. Therefore, we submit that the Hawes-Cooper Act is constitutional and that the laws of Ohio and other States regulating and suppressing traffic in prison made or convict made goods are constitutional. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

LAWS OF MINNESOTA, 1935

CHAPTER 267—S. F. NO. 437

An act to subject all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners of other states to the laws of the State of Minnesota.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods to be subject to laws of state.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, (except convicts or prisoners on parole or probation,) or in any penal and/or reformatory institutions transported into the State of Minnesota, and remaining therein for use, consumptions, sale, or storage, shall upon arrival and delivery in the State of Minnesota, be subject to the operation and effect of the laws of the State of Minnesota, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of Minnesota, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. Effective September 1, 1935.—This act shall take effect and be in force from and after September 1, 1935.

Approved April 24, 1935.

LAWS OF MINNESOTA, 1935

CHAPTER 268—S. F. NO. 438

An act to require the branding or marking of prison or convict made goods, wares and merchandise offered for sale or intended for sale in this State, providing penalties for violation thereof, and to repeal Chapter 138, Laws of Minnesota for 1929.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods must be marked.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, (except convicts or prisoners on parole or probation), or in any penal and/or reformatory institutions in this or any other state shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed or sold without such brand, label or mark thereon.

Sec. 2. Must contain the words "Prison made."—The brand, label or mark required by Section 1 hereof shall contain at the head or top thereof the words "Prison Made" followed by the year and name of the penal and/or reformatory institution in which it was manufactured, produced, or mined in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, a label shall be used and attached. Such brand, mark or label shall be placed or attached outside of and on a conspicuous part of the finished article so as to be plainly visible to the purchasing public and also shall be placed outside of its box, crate or covering.

Sec. 3. Sale of unmarked goods forbidden.—That no person shall sell, offer for sale, or have in possession for the purpose of sale, goods, wares or merchandise described in Section 1 of this Act without the brand, label or mark required by this Act being placed thereon or attached thereto, or remove, conceal or deface such brand, label or mark.

Sec. 4. Violation a misdemeanor.—Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor.

Sec. 5. Law repealed.—Chapter 138 of the Laws of Minnesota for 1929 is hereby repealed.

Sec. 6. Effective September 1, 1935.—This Act shall take effect and be in force from and after September 1, 1935. Approved April 24, 1935.

LAWS OF MINNESOTA, 1929

CHAPTER 138—H. F. NO. 216

An act to require the branding, labeling or marking of prison or convict made goods, wares and merchandise offered for sale or intended for sale in this State and providing penalties for violation thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods to be labeled.—Goods, wares and merchandise made by convict labor under contract in this or any other State imported, brought or introduced into this State, shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark.

The brand, label or mark required by the next preceding section shall contain at the head or top hereof the words "prison made" followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, label shall be used. Such brand, mark or label shall be placed outside of and in a conspicuous part of the finished article and its box, crate or covering.

A person dealing in convict made goods, wares or merchandise, as described in this chapter, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this chapter, or remove, conceal or deface the brand, label or mark thereon; but the provisions hereof shall not apply to such goods, wares or merchandise in possession of any such person at the time of the taking effect of this act.

Whoever violates any provision of this law shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than $100 or not to exceed 90 days imprisonment. Approved April 5, 1929.

SUPREME COURT OF THE UNITED STATES.

No. 377.—October Term, 1935.

Asa H. Whitfield, Petitioner, *vs.* The State of Ohio.	On Writ of Certiorari to the Supreme Court of the State of Ohio.

[March 2, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner was charged in the Municipal Court of Cleveland with a violation of § 2228-1 of the Ohio General Code, adopted March 23, 1933, which provides:

> "After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

By § 2228-2, a violation of this provision subjects the offender to a fine of not less than $25 nor more than $50 for the first offense. An Act of Congress passed January 19, 1929 (effective five years later), c. 79, §§ 1-2, 45 Stat. 1084, Title 49, U. S. C., § 60, commonly called the Hawes-Cooper Act, provides:

> "That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

The information contains two counts. The first count charges that petitioner, upon a day named, and within the City of Cleveland, Ohio, "did unlawfully sell on the open market certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation." By the second count it is charged that petitioner "did unlawfully sell for shipment to R. C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, . . . six dozen Chambray men's work shirts," manufactured by convicts or prisoners at the same prison in Alabama. The case was tried before the court upon a stipulation of facts substantially the same as those set forth in the information, with the addition, in respect of the first count, that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio, and that there is nothing harmful, injurious, or deleterious about the goods sold; that the six dozen shirts mentioned in the second count were not delivered to Kissack at the time of sale, but were to be shipped to his residence in Lakewood, Ohio, by railway express from the prison in Alabama.

The case was tried without a jury. The court found petitioner guilty upon both counts, and sentenced him to pay a fine of $25 and costs.

An appeal was taken to the Court of Appeals of Ohio, Eighth District, Cuyahoga County, where the judgment was affirmed. 49 Ohio App. 530. A petition in error to the Supreme Court of Ohio was dismissed by that court on the ground that no debatable constitutional question was involved. 129 Ohio St. 543. This court granted certiorari, 296 U. S. —.

Petitioner assails the constitutional validity of the Ohio statute and also of the Hawes-Cooper Act. The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that that court considered and passed upon the following contentions: that the Ohio statute abridged the privileges and immunities of petitioner as a citizen of the United States in violation of the Fourteenth Amendment, by depriving him of the privilege of selling goods, manufactured in Alabama by prison labor, in competition with citizens of Ohio engaged in selling like goods; that the Ohio statute constituted an unauthorized regulation of and a burden upon interstate commerce; and that the

Hawes-Cooper Act constituted an unlawful delegation of the power of Congress to the states. These questions, therefore, are properly here for consideration. *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 405-407; *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 153.

The policy of the state of Ohio for many years, as evidenced by its constitution and laws, has been to protect the products of free labor against competition from similar products brought into existence by prison labor. A section of the state constitution (Art. II, § 41), adopted in 1918, provides:

> "Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; . . . and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof."

1. The court below proceeded upon the assumption that petitioner was a citizen of the United States; and his status in that regard is not questioned. The effect of the privileges and immunities clause of the Fourteenth Amendment, as applied to the facts of the present case, is to deny the power of Ohio to impose restraints upon citizens of the United States resident in Alabama in respect of the disposition of goods within Ohio, if like restraints are not imposed upon citizens resident in Ohio. The effect of the similar clause found in the Fourth Article of the Constitution, as applied to these facts, would be the same, since that clause is directed against discrimination by a state in favor of its own citizens and against the citizens of other states. The *Slaughter-House Case,* 1 Wood 21, 28; *Bradwell* v. *The State,* 16 Wall. 130, 138. As interpreted by the court below, the laws of Ohio passed in pursuance of the state constitution prohibit the sale in the open market of goods made in Ohio by convict labor. The statutory provision here challenged enforces, without discrimination, the same rule as

to the convict-made goods of other states when they are brought into Ohio; and the contention in respect of the privileges and immunities clause must be rejected as without substance. Compare *Scott* v. *Donald,* 165 U. S. 58, 100; *Colgate* v. *Harvey* (December 16, 1935), 296 U. S. —.

2. A serious question as to the infringement of the commerce clause of the Constitution is presented by the second count of the information. That count alleges that the prison-made goods described were sold to a purchaser in Ohio for shipment via railway express from a prison in Alabama. Whether the court below intended to sustain this count is not clear; but the state confines its argument here to a defense of its asserted power to prohibit and penalize the sale of such goods upon the open market and the statute apparently goes no further than this. In any event, for present purposes, we lay that count out of the case, and limit our consideration to the first count. True, the petitioner was found guilty upon both counts, but the penalty imposed upon him does not exceed that which might have been exacted under the first count if it had stood alone. The case, therefore, falls within the rule, frequently stated by this court, that a judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment. *Claassen* v. *United States,* 142 U. S. 140, 146; *Evans* v. *United States,* 153 U. S. 584, 595; *Abrams* v. *United States,* 250 U. S. 616, 619; *Brooks* v. *United States,* 267 U. S. 432, 441.

The first count simply charges, in the terms of the statute, that petitioner unlawfully sold on the open market in Ohio certain goods made by prison labor in Alabama. These goods, according to the stipulation of facts, were sold in original packages as they were shipped in interstate commerce into Ohio. When the goods were sold, their transportation had come to an end; and the regulative power of the state had attached, except so far as that power might be affected by the fact that the packages were still unbroken. But any restrictive influence which that fact otherwise might have had upon the state power was completely removed by Congress, if the Hawes-Cooper Act be valid. That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, c. 728, 26 Stat. 313, as construed and upheld by this court. *Rhodes* v. *Iowa,* 170 U. S. 412, 421-423, 426; *In re Rahrer,* 140 U. S. 545, 559-560, 562, 564. In effect, both acts provide (the one as construed and the other in terms) that the subject matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory; and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. *Rhodes* v. *Iowa, supra,* pp. 420, 423-424. The interstate transaction in its fundamental aspect ends upon delivery to the consignee.

The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil. In addition to the Hawes-Cooper Act, the importation of the products of convict labor has been denied the right of entry at the ports of the United States and the importation prohibited. C. 497, § 307, 46 Stat. 689; Title 19 U. S. C. (1934 ed.), § 1307. And the sale to the public in competition with private enterprise of goods made by convicts imprisoned under federal law is forbidden. C. 340, § 5, 46 Stat. 391; Title 18 U. S. C. (1934 ed.), § 744c.

All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument. The proposition is not contested that the Ohio statute would be unassailable if made to take effect after a sale in the original package. And the statute as it now reads is equally unassailable, since Congress has provided that the particular subjects of interstate commerce here involved "shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case", *In Rahrer, supra,* p. 562, namely upon arrival and delivery.

If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. Even without such action by Congress the unbroken-package doctrine, as applied to interstate commerce, has come to be regarded, generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 508-509, as affording no immunity from state taxation. "The interstate transportation", this court there concluded, "was at an end, and whether in the original package or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

Whether that view of the doctrine as applied to state taxation should now be given a more general application, the Hawes-Cooper Act, being determinative of the case now under review, makes it unnecessary for us to decide.

3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the states is made clear by *In re Rahrer, supra,* pp. 560-561, and by what we have already said under subdivision 2.

Judgment affirmed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, and Mr. Justice STONE concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.